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THE ERIE OUTCOME TEST AS A GUIDE TO SUBSTANCE AND PROCEDURE IN THE CONFLICT OF LAWS

ROBERT ALLEN SEDLER

I

THE NATURE OF THE PROBLEM

A case coming before a court may be classified as either foreign or domestic. A domestic case is either one in which all the operative facts have taken place in the state in which the court is sitting or one in which the forum has determined that its approach will not be affected by the foreign elements of the case. A foreign case is one in which some or all of the operative facts have occurred elsewhere, so that the court must determine to what extent reference must be made to the law of another state¹ in order to decide the case. The purpose of this article is to determine to what extent such reference will be made once it has been decided that the case is a foreign one.

It was originally thought that the forum gave "comity" to the law of another state.² In more recent times, however, it has been recognized that this is merely an explanation *after* the event and not a description of the process by which the forum decides whether reference is to be made to the law of another state. The Restatement³ and a probable majority of the courts have adopted the simpler explanation that the forum enforces a "right" created by another state.⁴

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1. In conflict of laws "state" means any geographical portion of the earth's surface having an independent system of law. All portions of a federal system are states, though they are not fully sovereign and are not States of the Union.

2. In this country the theory was primarily developed by Joseph Story, the first American writer on the conflict of laws. His great work was *Commentaries on the Conflict of Laws* (1834). The significance of the comity theory lies in its emphasis on territoriality as the basis of power to create rights and liabilities. This finds expression in the concept of in personam jurisdiction and forms the basis of "long-arm" statutes—a state's power over acts occurring there gives it the power to adjudicate rights and liabilities with respect to such acts. The doctrine has significance in a negative sense even when power is not in issue. Statutes are held to be presumed not to apply extra-territorially. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). But see *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), where the presumption was rebutted because of prospective harmful effects.

3. Restatement, Conflict of Laws § 1 (1934).

4. Professor Beale has been the most articulate exponent of this theory. His great work, *Treatise on the Conflict of Laws* (1935), fully develops the theory as applied to the various phases of conflicts of law. The classic judicial opinions are those of Justice Holmes in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904), and Judge Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

Despite its simplicity, this explanation contains some fallacies⁵ and is not consistent with the approach taken in certain types of cases.⁶ While a discussion of the theories of the nature of the conflict of laws is necessarily beyond the scope of this writing,⁷ it is often necessary for an author who is dealing with conflicts problems to state the theory under which he is proceeding. The theory employed herein is that aspect of the local law theory developed by the late Walter Wheeler Cook.

The local law theory developed contemporaneously with the vested rights theory. As propounded by such writers as Wharton and Lorenzen,⁸ the local law theory recognizes that a court administers no law but its own. However, where a case is characterized as foreign, the court decides that the law of another state shall to some extent be used as a model in deciding the case. The law of the locus is "incorporated by reference." Judge Learned Hand has talked in terms of a "highly homologous right," which is created by the locus and used by the forum as a model.⁹

The theory was further refined by Professor Walter Wheeler Cook in recognition of the fact that the conflict of laws, like all branches of law, reflects social and economic policies of the administering court as well as that court's notions of justice.¹⁰ According to Cook,

5. Professor Cook has effectively demonstrated the fallacies. See Cook, *The Logical and Legal Bases of the Conflict of Laws* 16-39 (1942).

6. For example, where the forum rejects the *renvoi*, it enforces a "right" that does not exist at the locus, since the locus would be looking to the forum to determine if that right existed.

7. For an excellent discussion see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 *Harv. L. Rev.* 361 (1945).

8. See Lorenzen, *Selected Articles on the Conflict of Laws* (1947); Wharton, *Conflict of Laws* (3d ed. 1905).

9. See particularly his opinions in *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938), and *Scheer v. Rockne Motors Corp.*, 68 F.2d 942 (2d Cir. 1934).

10. For a discussion of the Hand and Cook approaches see Cavers, *The Two "Local Law" Theories*, 63 *Harv. L. Rev.* 822 (1950). The author suggests that Hand's should be called the "homologous right theory" and Cook's, the "local law theory." *Id.* at 831-32. The difference between the approaches is demonstrated by Hand's opinion in *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938). There the husband was sued for an assault which the wife committed in Florida. The husband was not present, and suit was based on coverture liability imposed by Florida law. The federal district court held that enforcement of coverture liability would be denied on public policy grounds. The appellate court affirmed, but on the theory that Florida could not create a "right" against the husband, since he was not present and had not "consented" to legislative jurisdiction. The husband had contended that the Florida statute was not applicable to him, but the court found it unnecessary to reach that question in view of its approach to the problem.

Under Cook's approach, however, the first question to be decided would have been how Florida would have decided this very case. If Florida would not hold the statute applicable, then the forum should not use its law as a model. In making that prediction,

the forum decides by means of a prediction how hypothetical judicial officials at the locus would decide *this very case* if it were presented to them. Ignoring abstract propositions of law developed in cases that the locus would characterize as domestic, the forum decides what the locus would do with the case. The decision is based not only upon what the locus has done in similar cases, but also upon a consideration of the various policies the locus appears to be trying to implement. The forum then decides what it will do with the case before it, that is, to what extent it will use the *lex loci* as a model. Under Cook's approach the reference to foreign law need not be unitary. The incorporation is limited where the policies sought to be implemented by the locus conflict with legitimate interests sought to be protected by the forum. This approach is very flexible and is designed to insure results which are sound in the individual case rather than decisions which are in accord with some abstract proposition. This approach will be employed in describing the process of looking to the foreign law.

Initially the forum must determine whether the case is potentially a foreign one. If it is, the court must decide which state's law will be used as a model with respect to various aspects of the transaction. The first step in making this decision is the characterization of the question of law as one of tort law, contract law, family law, or the like. This should not be a conceptualization, but a device by which conflicting policies are sharply focused and a value judgment made. Once the principal question has been categorized, a choice of law rule will follow almost automatically. If the question is characterized as one of tort law, it is governed by the *lex loci delicti*; if family law or decedent estate law, usually by the *lex domicilii*; if contract law, by either the *lex loci contractus*, the law of the place of performance, the place the parties intended, or the center of gravity; if real property law, by the *lex loci rei sitae*; and so on.

For example, let us say that the issue is one of interspousal immunity from tort liability. The wife is suing her husband in Wisconsin for injuries suffered in an automobile accident in Illinois. Both parties are Wisconsin domiciliaries. Under the law of the forum the suit can be maintained; under the law of Illinois, where the accident occurred, it cannot. If the principal question is characterized as one of family law rather than tort law, the logical choice of law rule looks to the *lex domicilii*. By looking to the *lex domicilii* the court can protect its

the forum would try to determine what policies Florida was trying to promote by coverture liability. If it found that Florida would decide to hold the husband liable, then it would have to decide whether it should use the law of Florida as a model to impose liability on the husband, in view of its own policies and interests.

domiciliaries. Its policy is in effect to permit the injured spouse to recover against the husband's insurer despite the possibility of collusion or disruption of marital unity.¹¹

The next step is to determine the locus to which the choice of law rule looks. For example, the forum may have to decide what is the *lex loci delicti*. Is it the place where the defendant acted or the place where the injury occurred? Answering this question may be called characterizing the contact point. This characterization is also made with reference to the policies of the forum.¹² If the defendant has committed in the forum acts of a kind which the court wants to deter, the place where the defendant acted will probably be held to be the *locus delicti*.¹³

At this point the forum has determined a particular locus, the law of which it is prepared to use as a model. Assuming no question of the renvoi¹⁴ or public policy,¹⁵ the forum can predict what the locus

11. See *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959), which reached this result. Compare the less sophisticated technique employed to apply the *lex fori* in *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936), where the court characterized the question as one of tort law, but held it was against its public policy to permit suit by one spouse against another.

12. The forum's concept of domicile will be employed to determine if a party has acquired a domicile, even though a different result would be reached under the concepts of the state in which the forum finds him domiciled. In *re Annesley*, [1926] 1 Ch. 692. See Restatement, Conflict of Laws § 10 (1934). In *Annesley*, the forum thought that the estate of a deceased Englishwoman should be administered with reference to the law of a state where she resided and where she had the intention to remain. It was not interested in the law of that state except as it was her domicile, and thus was not concerned with its concept of domicile. But compare the approach taken in the same case to the problem of the renvoi.

13. See, e.g., *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957), holding that a party selling liquor to an intoxicated person in the forum was liable under the forum's Dram Shop Act, even though the actual injury occurred in another state.

14. The problem arises when the locus looks back to the forum or to a third state (here it is more accurately called the *envoi*). A discussion of methods of resolving the renvoi is necessarily beyond the scope of this article. Generally, American courts still apply the *lex loci*, that is, reject the renvoi. See Restatement, Conflict of Laws § 7 (1934). But see *Matter of Schneider*, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. 1950), where the court accepted the renvoi and applied its own law on the ground that the locus would have applied New York law. Note that it still did not reach the question whether the locus would apply New York law where New York would have applied the *lex loci* if the case had arisen in New York.

15. By "public policy," I mean the refusal to enforce a claim that the forum considers highly undesirable. The doctrine received great emphasis under the comity theory, where the mere fact that the foreign law was different was said in some cases to make it against the forum's public policy to enforce it. See *Hudson v. Von Hamm*, 85 Cal. App. 323, 259 Pac. 374 (Dist. Ct. App. 1927). The more realistic approach was that the forum would enforce the claim unless to do so would violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918). But note the result in *Ciampittello v. Ciampitello*, 134 Conn. 51, 54 A.2d 669 (1947),

would do and act on the prediction to fashion a rule of decision in the particular case. It should be noted that the law of more than one state may govern different issues. For example, the law of the state where the parties attempted to make a contract may govern as to the issue of whether a contract was made, while the law of the place of intended performance may govern as to matters relating to performance. For the purposes of this article, I will talk in terms of *a* locus on a particular issue, but will refer generically to *the* locus.

Even though the case has been characterized as foreign and the court has decided to look to the law of the locus as a model, it must be remembered that *the forum cannot become a court of the locus*. It cannot suspend its normal operations and bring over every aspect of the law of the locus. This was recognized as soon as the concept of looking to foreign law developed. How much of the *lex loci* will the forum use as a model and how will this quantitative determination be made?

It was early decided that matters of "procedure" ought to be governed by the law of the forum, and matters of "substance" by the law of the locus. This line of demarcation continues to be accepted.¹⁰ Although a vast amount of case law has developed in applying this rule, it is submitted that no test has been devised which will enable courts accurately to draw the line between substantive and procedural matters. Conceptually, it is possible to draw a meaningful distinction between substance and procedure. We can say that "substance" refers to whether a right or liability exists, and "procedure" refers to the method by which the right is enforced or the liability imposed. The real difficulty arises, however, when this conceptual distinction is employed in an area where the solution of problems is not dependent upon distinctions between the existence of a right and the method of enforcing it. This difficulty has been compounded because courts have employed this conceptualized distinction between substance and procedure to reach results in a number of situations, each of which raises different policy considerations. We shall combine these different situations¹⁷ into three major categories: (1) local law; (2) *Erie*;¹⁸ and (3) the conflict of laws.

where both the majority and the dissent based their reasoning on this test. The majority denied recovery of proceeds from parimutuel betting, which was illegal in the forum. To the extent that the forum's characterization and choice of law rules cause it to look to its own law when its real interests are involved, and to the extent that courts are becoming less parochial, the doctrine is decidedly on the wane.

16. See Restatement, Conflict of Laws § 585 (1934).

17. They are set forth in Cook, *supra* note 5, at 163-65. Some of the categories are now changed because of the differing role of the federal courts in the post-*Erie* situation.

18. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Closely analogous is the "reverse

Local law.—In two types of cases which contain no foreign element, courts draw the distinction between substance and procedure to determine the validity of action taken within the state. The most common situation occurs when legislation is challenged on the ground that it has operated retroactively to destroy rights. Retroactive legislation is said to be constitutional if it affects matters of procedure, but not if it affects substantive rights. The rationale is that while it would be unfair to alter established interests retroactively, it is not unfair to alter the mode of enforcing such interests since people do not expect that the mode of enforcement will remain constant. The test is whether the legislation is fair with a view toward the expectation interests of the persons affected.¹⁹ Applying this test, it has been held, for example, that the legislature can constitutionally change the burden of proving contributory negligence and apply the statute to causes of action arising before its enactment.²⁰ No one could expect that the burden of proof would necessarily remain constant from the time of injury to the time of trial, though one could expect that contributory negligence would continue to remain a defense.

The other common situation in the local law area involves the rule-making power of the court, which is limited to matters of procedure. The question is one of the proper relationship between the courts and the legislature. The court is legitimately concerned only with matters relating to the process by which interests are enforced.²¹ Here again, the analytical basis of the distinction is sound when the underlying rationale is considered. In other words, in determining whether vested interests have been impaired by retroactive legislation or whether the court has exceeded its rule-making powers, it is proper to ask whether the matter relates to the existence of a right or liability or to the mode of its enforcement.

Erie.—For *Erie* purposes “substance and procedure” is a phrase with a quite different meaning. Under the Rules of Decision Act,²² where state law is in issue²³ as to matters of “substance,” the law

Erie” situation, where the state court is enforcing a federal statutory right, for example, under the Federal Employers Liability Act. Here the question is largely one of statutory interpretation, i.e., to what extent does Congress require the state courts to follow federal procedure. The problem is discussed in Hill, Substance and Procedure in State FELA Actions—The Converse of the *Erie* Problem?, 17 Ohio St. L.J. 384 (1956).

19. See Cook, *supra* note 5, at 165-66.

20. See, e.g., *Easterling Lumber Co. v. Pierce*, 235 U.S. 380 (1914).

21. It has been held by at least one court that under the state constitution the legislature does not have the power to make procedural rules in violation of those established by the court. *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950).

22. 28 U.S.C. § 1652 (1958).

23. This occurs primarily in cases where jurisdiction is founded on diversity of

which controls is the law of the state in which the federal court sits.²⁴ An extended discussion of the *Erie* doctrine and the problems it raises is necessarily beyond the scope of this article. The *Erie* doctrine can be understood only in light of the reasoning upon which diversity jurisdiction is based. Diversity jurisdiction is intended to prevent local bias against an out-of-state litigant by insuring control of the trial by a federal judge who enjoys life tenure and is free from local pressures.²⁵ While juries are drawn from within the state, the federal judge can insure a fair trial to the out-of-state litigant. Since this is the sole basis for diversity jurisdiction, the outcome of each case should be the same in the federal court as it would be in a state court. Therefore, all matters materially affecting the outcome of the case are considered "substantive" and must be determined by state law.²⁶

Many matters relating to the mode of enforcement materially affect the outcome of cases, and state law has been held to govern such matters.²⁷ Since the underlying rationale of the substance-procedure distinction is basically different for *Erie* and local law purposes, it is not surprising that the analytical basis of the distinction is sound in the latter situation and completely inapplicable in the former.²⁸ In view of the difference in the underlying rationale, it is immaterial that the same words are used.

There are some situations in which state law is not applied for *Erie* purposes even though the matter in issue materially affects the outcome. The role of a federal court in the federal system prevents that court from becoming "only another court of the state."²⁹ Federal courts do not have the same source of authority as state courts. For example, the practice of having the issue of contributory negligence

citizenship. In the other areas where reference is made to state law, the courts were more likely to look to the state decisions even before *Erie*.

24. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). This case has given rise to extensive comment. An excellent discussion shortly after the decision which accurately predicted its future course is Tunks, *Categorization and Federalism: "Substance" and "Procedure"* After *Erie Railroad v. Tompkins*, 34 Ill. L. Rev. 271 (1939). For a discussion of the doctrine in light of more recent developments see Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. Rev. 427, 451 (1958).

25. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 111-12 (1945).

26. *Id.* at 108-09.

27. These include such matters as burdens of proof, see notes 193-212 *infra* and accompanying text, and statutes of limitations, see notes 146-71 *infra* and accompanying text.

28. The different meanings of the terms for local law, *Erie*, and conflicts purposes are discussed in *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

29. The role of federal courts in diversity cases was referred to in these terms in *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). The expression is an unfortunate one, and is another example of the potential danger in loose terminology.

decided by the jury which is followed in some states is not binding on the federal courts, since the right to a trial by jury guaranteed by the Seventh Amendment includes the right to have a directed verdict in a proper case.³⁰ Similarly, the fact that the state courts would have an issue determined by the judge is not binding on the federal courts where the issue is properly triable by the jury.³¹ It has not been definitely established whether the latter result is necessarily compelled by the Seventh Amendment,³² but, in any event, it represents a limitation on the outcome test. Certain matters must be controlled by federal procedural policy or other requirements of the federal constitution, even though they may materially affect the outcome of the case.³³

Conflicts.—The question that must be answered next is why courts should distinguish substance and procedure for conflicts purposes. That the forum is concerned with the customary operation of its own judicial machinery does not answer the question of how much of the law of the locus should be used as a model. A determination must first be made as to why the forum looks to the *lex loci* as a model. The answer is that the forum—through the process previously outlined—decides that the case is a foreign one and that certain issues are to be determined with reference to the law of another state. In making that judgment, the forum decides that it has no interest in the rights and liabilities involved in the case, but is merely serving as a forum of convenience. The court hears the case because it desires to or because of constitutional compulsion.³⁴ Ideally, suit should have been brought in another state—the state with such an interest in the transaction that its law must be used as a model by the forum. Where the law of more than one state is looked to as a model to determine different issues, however, the ideal situation is impossible.

30. *Diederich v. American News Co.*, 128 F.2d 144 (10th Cir. 1942). The same result was reached in the pre-Erie case of *Herron v. Southern Pac. Co.*, 283 U.S. 91 (1931), at a time when the federal courts were bound to follow state procedural law.

31. *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

32. The Court did not decide in either of the cases cited in the previous footnote whether the Seventh Amendment applied. Both cases involved workmen's compensation proceedings, which would not have constituted a suit at common law. In fact, in *Byrd v. Blue Ridge Rural Elec. Coop.*, *supra* note 31, the Court specifically refused to consider the question. For the view that the result is required by the Seventh Amendment, see *Whicher, The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 *Texas L. Rev.* 549 (1959).

33. This problem is discussed at greater length in the section of the article dealing with judge-jury allocation. See notes 259-80 *infra* and accompanying text.

34. In certain instances the full faith and credit clause and possibly the Fourteenth Amendment due process clause require the forum to open its doors to claims arising under the law of a sister state. See generally *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952).

Where the ideal situation either does not or cannot prevail, the forum should, as far as possible, try to insure that the result in its courts will be the same as the result would have been if suit had been brought at the locus. *Therefore, the forum should incorporate by reference as much of the law of the locus as is likely to bear materially on the ultimate outcome irrespective of whether the matter is analytically characterized as one of substance or procedure.* This argument has been advocated for some time.³⁵ There is no problem when the issue is analytically one of substance. It is only when the issue is analytically procedural that the underlying rationale of looking to the law of another state as a model must be considered.

The forum fails to consider the law of the locus as a model if it automatically rules that all matters which are analytically procedural are to be governed by the *lex fori*. A similar objection can be made when the forum automatically accepts the locus' characterization of a point of law as procedural, *even though the cases at the locus involve problems of local law and not of conflicts.* Even the fact that the locus has characterized a particular matter as procedural for conflicts purposes should not be controlling on the forum. The forum is merely using the law of the locus as a model; its purpose should be to achieve the same result as would occur at the locus. If the matter bears materially on the outcome, the forum should incorporate the *lex loci* as a model. The locus' characterization of the issue is irrelevant from the forum's standpoint. It does not solve the problem to say that analytical characterization is not harmful because the correct result will be produced in the majority of cases, or because the court will decide doubtful cases correctly.³⁶ As will be demonstrated, the courts have treated many matters as procedural which have materially affected the outcome of cases, and have therefore failed to look to the *lex loci* as a model.

It will also be seen, however, that courts often apply the law of the locus in analytically procedural matters. This is done on an *ad hoc* basis without any consistent guide. It is submitted that the *Erie* outcome test can furnish such a guide, for *the underlying rationale for the application of the state law in an Erie situation is substantially the*

35. See Cook, *supra* note 5, at 166; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. Pa. L. Rev. 933 (1930); Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153 (1944).

36. Mr. Ailes has contended that there is "surprisingly little difference in result between the existing precedents and Professor Cook's program." Ailes, *Substance and Procedure in the Conflict of Laws*, 39 Mich. L. Rev. 393, 413 (1941). Professor Cook admits that the practice of the courts is generally better than their theory, but points out that sooner or later bad theory will lead to bad results. Cook, *supra* note 5, at 186.

same as the rationale for the application of the *lex loci* in a conflicts situation. The sole purpose of a federal court in a diversity case is to furnish an impartial forum. The only purpose of a court in a conflicts case, once it has decided that it will look to the law of another state, is to serve as a forum of convenience. In each situation the court should use as a model as much of the law of the reference point as will materially affect the outcome. It is conceded, of course, that matters which are analytically substantive will materially affect the outcome. Therefore there can be no objection to drawing the substantive-procedural distinction initially, provided the inquiry does not terminate once something has been characterized as analytically procedural.

The application of the *Erie* test to the law of conflicts is intended as one of the contributions of this article. This application has already been suggested, at least in the sense that *Erie* is recognized as having had some influence on the broadening concept of procedure.³⁷ Thus, in the recent case of *Hausman v. Buckley*,³⁸ the court drew an analogy to an *Erie* case in determining what should be decided in accordance with the law of the locus in a conflicts situation.³⁹ It is submitted that the outcome test of *Erie* may furnish a guide for the determination of the extent to which the *lex loci* should be incorporated in dealing with a conflicts problem.

The second aspect of the outcome test must be considered as well. It has been noted that the forum must be free to operate its judicial machinery in its customary manner. Just what does this mean? Other discussions of the outcome test as a guide in conflicts cases have talked in terms of the inconvenience to the forum of having to bring over certain aspects of the law of the locus⁴⁰ or "weighty practical considerations [that] demand the application of the law of the forum."⁴¹ More than a mere question of practicality is involved, however. It has been emphasized that the court of the forum cannot become a court of another state. It must operate its judicial system as it sees fit. The

37. See Morgan, Rules of Evidence—Substantive or Procedural?, 10 Vand. L. Rev. 467, 470 (1957).

38. 299 F.2d 696, 701 (2d Cir.), cert. denied, 369 U.S. 885 (1962). This case is discussed in greater detail in the section dealing with maintenance of suit. See notes 127-28 *infra* and accompanying text.

39. In *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940), the court indicated an awareness that each situation has its own rationale, but nonetheless recognized a relationship between the *Erie* and conflicts of law situations. The "novel" approach of *Sampson v. Channell* is now accepted in theory. Dispute arises over its application in the conflicts area. The Supreme Court cannot answer this question as it answers the ones arising under *Erie*.

40. Cook, *supra* note 5, at 169.

41. Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 195 (1944).

historical justification for drawing substance-procedure distinctions was sound to the extent that it recognized this fact.⁴² The error was made in employing the analytical substance-procedure distinction to determine how much of the law of the locus should be brought over. There are many matters, analytically procedural, which materially affect the outcome of the litigation and which can be brought over by the forum *without any interference with the efficient operation of its judicial system*.⁴³

This being so, why have courts hesitated to bring over many aspects of the law of the locus that will materially affect the outcome but would cause no such interference? Apart from the failure to realize that analytical characterization is improper in the conflicts situation (and not all courts have been guilty of this), it is suggested that courts have been concerned with their own *procedural policy*. Professor Lorenzen has used the term, "matter . . . of a nature to pass conveniently and without ethical shock through the legal machinery of the forum."⁴⁴ Professor Morgan has spoken of matters of the *lex loci* that analytically deal with procedure as the forum's "public policy."⁴⁵ Underlying these ideas is the recognition that the forum which is trying the case has been convinced by experience that certain things must be done in the course of litigation in order to insure a proper and fair result. The difference between the law of the forum and that of the locus may actually be much greater in matters which are analytically procedural. The common law, and even statutory law, does not really differ that much from state to state. But lawyers and judges constantly try to alter the method of judicial enforcement. Thus, even though a matter may materially affect the outcome, the forum will not and should not use the *lex loci* as a model if to do so would interfere with the forum's strong procedural policy. For this policy embodies methods which experience has taught the forum are necessary for the administration of justice.

42. As Professor Lorenzen has pointed out in *The Statute of Frauds and the Conflict of Laws*, 32 Yale L.J. 311, 332 (1923):

The wide meaning given to the term "procedure" in the Conflict of Laws has already done much mischief. Our courts would do well to keep in mind the real meaning of the rule that all matters of procedure are governed by the local law of the forum. The sole object of the rule is to enable the courts to operate the judicial machinery in the customary manner. There are vast differences in the technical rules controlling the conduct of litigation under the systems of procedure prevailing in the different countries and any attempt to try a "foreign" cause of action in accordance with the rules of the state or country in which it arose would be doomed to failure.

43. See Stumberg, *Conflict of Laws* 155-56 (2d ed. 1951).

44. Lorenzen, *The Statute of Frauds and The Conflict of Laws*, 32 Yale L.J. 311, 332 (1923).

45. Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 195 (1944).

The procedural policy of the forum should be distinguished from its "public policy," which may cause the court to refuse to entertain a claim that it considers highly improper.⁴⁶ The forum has a legitimate interest in the procedure of enforcing substantive rights which arise under the law of another state. The operative events of enforcement take place in the forum. This gives the forum an interest not present when it is asked merely to recognize the law of another state. The forum is responsible for the procedure of enforcing substantive rights under the *lex loci*. Thus a court hesitates to incorporate the foreign law as to matters analytically procedural either because the matter offends its notions as to how a trial should be conducted or because of the fear that by incorporating foreign procedure it will in the future find that it must incorporate something that offends its strong procedural policy.

Again, a court faced with such a problem needs a guide, and it is submitted that *Erie* furnishes this guide. As the previous discussion has indicated, matters materially affecting the outcome will not be determined by state law when they violate matters such as the relationship between judge and jury. There is a difference, however, between the *Erie* and conflicts situations if the federal courts are limited to the procedural policy as expressed in other constitutional provisions.⁴⁷ Obviously no such limitation exists in a conflicts situation, and the forum may give full play to its strong procedural policy. When the courts realize that in a proper case they are to refuse to bring over the *lex loci* that offends their strong procedural policy, they will not hesitate to bring it over, even when different, if the matter is one that does not involve a strong procedural policy of the forum. Therefore, the following test is proposed for determining how much of the *lex loci* the forum should use as a model: *To the extent that the matter in question materially affects the outcome of the case, the forum should use the lex loci as a model except where to do so would interfere with the efficient operation of the forum's judicial system or violate a strong procedural policy of the forum.*⁴⁸

This is the same test that exists for *Erie* purposes, with the possible exception that procedural policy of the federal courts is limited to that which is contained in the Constitution. Note that the test makes no reference to substance and procedure as the line of demarcation.

46. As to the meaning and significance of "public policy," see note 15 *supra*.

47. See *Whicher*, *supra* note 32.

48. Note that this is basically the same test proposed by Professor Morgan in *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 195 (1944). However, he does not elaborate on this aspect.

Further, the test contains no exception based upon public policy. Considerations of public policy are important only in the initial determination of whether or not the forum should hear the case.⁴⁹ If the forum decides not to hear the case, there is no issue as to how much of the *lex loci* should be incorporated.

The test can be applied on a sliding scale basis. If it is not clear whether the matter materially affects the outcome, and if there is a strong possibility that incorporation of the *lex loci* will interfere with the effective operation of the forum's judicial system or violate a strong procedural policy, then the *lex loci* should not be used as a model.⁵⁰ If the matter may affect the outcome and does not interfere with the operation or violate the policy, then the *lex loci* should be used as a model. If the matter clearly affects the outcome and will only cause some slight interference or possibly violate some procedural policy, then the *lex loci* should probably be incorporated. Three clear cases are where the matter: (1) does not materially affect the outcome (no incorporation); (2) violates a strong procedural policy or interferes with the efficient operation of the judicial system (no incorporation); and (3) materially affects the outcome, but causes no interference and does not violate a strong procedural policy (incorporation).

To some extent the cases indicate that the courts may be employing this approach without clearly articulating it. But there are too many cases in which courts have refused to use the *lex loci* as a model, even though a matter materially affected the outcome, and even though there existed no countervailing considerations to justify the refusal. By establishing a standard, courts can approach the problem more realistically and are more likely to arrive at sound results.

II

APPLICATION OF THE TEST

At the outset it may be well to note the situations which require federal courts to look to state law for *Erie* purposes, but which present no occasion for the forum to look to the *lex loci* in a conflicts case.⁵¹ The most obvious example is conflict of law rules, which are controlled

49. Note that a refusal to hear the case on public policy grounds is not a judgment on the merits. See *Glencove Granite Co. v. City Trust, Safe Deposit & Sur. Co.*, 118 Fed. 386 (3d Cir.), cert. denied, 187 U.S. 649 (1902).

50. See note 31 *supra* and accompanying text. This was really the approach taken in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

51. It should be noted here that evidence questions are determined with a view toward admissibility, so that if they are admissible under state law, no problem will arise. Fed. R. Civ. P. 43(a). Thus in a conflicts situation there may be the problem of evidence admissible at the locus, but not at the forum; this cannot arise under *Erie*. This is an example of the converse of the problem discussed in this section.

by state law for *Erie* purposes.⁵² In a conflicts case, the forum initially applies its own conflicts rules to identify the locus. Obviously, the forum cannot look to the *lex loci* until the particular locus has been identified. If the locus, once identified, presents different conflicts rules, the problem is one of the renvoi or the envoi rather than one of how much of the *lex loci* should be brought over.⁵³

A similar case is presented where the issue is one of venue or of forum non conveniens.⁵⁴ If the suit would have been dismissed in the locus because of lack of contact with the transaction, it is difficult to see how the forum could constitutionally use the *lex loci* as a model, or why it would desire to do so.

For *Erie* purposes, it is not clear whether a foreign corporation's amenability to suit is controlled by federal or state law.⁵⁵ This question will not arise in a conflicts situation. If the corporation is not subject to suit under the statutes of the forum, the court simply cannot permit the suit. The question which would be presented if the corporation were subject to suit in the forum but not at the locus is unlikely to arise. The elements of the case which make it desirable to bring over the *lex loci* would doubtless be sufficient to make the corporation subject to suit at the locus under the various "long-arm" statutes. Where a claim is void under the *lex loci*, there can be no question of refusing to enforce a claim on the grounds that it violates public policy.⁵⁶ Questions of public policy arise only when the claim is valid at the locus but runs counter to the public policy of the forum.

Remedies

Confusion has been caused in this area by treating remedies as a matter of procedure. It is true that the question of remedies is governed by the *lex fori*, but this rule does not rest on the distinction between substance and procedure. The point is that the forum can give only those remedies for which its judicial machinery is equipped. Thus, if the *lex loci* specifies that recovery in workmen's compensation pro-

52. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

53. But note that under the "total reference approach" the forum attempts to reach the same outcome as the reference state. See *In re Annesley*, [1926] 1 Ch. 692.

54. There is a split of authority in the federal courts as to whether forum non conveniens was abolished by the passage of 28 U.S.C. § 1404(a). Compare *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950), with *Willis v. Weil Pump Co.*, 222 F.2d 261 (2d Cir. 1955).

55. See the discussion and citation of conflicting authorities in *JafTex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960), where it was held that state law was not controlling.

56. For *Erie* purposes this is controlled by state law. *Angel v. Bullington*, 330 U.S. 183 (1947); *Griffin v. McCoach*, 313 U.S. 498 (1941).

ceedings must be had before an administrative agency, and the forum does not have such an agency, the forum cannot give relief under the statute.⁵⁷

Specific Relief.—Because of the severity of contempt sanctions for failure to comply with a decree of specific performance, the forum will not look to the *lex loci* to determine if specific relief should be granted. Full faith and credit does not require that the decree of a sister state be recognized by granting specific relief, even though such relief would be granted at the locus.⁵⁸ The forum looks to the locus as a model to determine liability, but decides whether it will grant specific relief or damages. In making this decision, the forum will consider whether the granting of specific relief would give the party a different benefit than he would be entitled to under the *lex loci*. Thus, in *Galligan v. Galligan-Owen Corp.*,⁵⁹ the court refused to enjoin a sale of corporate assets where, under the law of the state of incorporation, a shareholder objecting to a sale was only entitled to redeem his shares. A similar situation arose in an *Erie* context in *Allstate Ins. Co. v. Charneski*.⁶⁰ There a federal court refused to permit a declaratory judgment action by an insurer against a party injured by the insured. The state had a direct action statute, and its policy was to have all issues, including coverage, decided in a single action.⁶¹ This reasoning is equally applicable in a conflicts situation. Basically, the forum will not grant specific relief when to do so would be to alter the nature of the interest created by the locus. Regardless of the practice of the locus, specific relief will also be denied where the forum considers the case an improper one in which to grant such relief.

Execution.—A further question arises with regard to the execution of a foreign judgment. Since execution takes place in the forum, it can be granted only by the means available. Moreover, the forum

57. *Green v. J. A. Jones Constr. Co.*, 161 F.2d 359 (5th Cir. 1947). See *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904), where the principle was applied to bar recovery because under the *lex loci delicti* payment for wrongful death was to be in installments subject to modification in the future.

58. See Restatement, Conflict of Laws § 449(1) (1934) and particularly comment (a) to that section. Cases such as *Fall v. Eastin*, 215 U.S. 1 (1909), which held that a state need not recognize a decree for specific performance to land located in the forum nor order specific performance because this was done at the locus, are explainable on this ground and not on the ground that "equity decrees" are not entitled to full faith and credit. Cf. *Sistare v. Sistare*, 218 U.S. 1 (1910), holding that an alimony decree not modifiable retroactively is entitled to full faith and credit as to accrued payments.

59. 19 Misc. 2d 787, 187 N.Y.S.2d 163 (Sup. Ct. 1959).

60. 286 F.2d 238 (7th Cir. 1960).

61. See also *Galion Iron Works & Mfg. Co. v. Russell*, 167 F. Supp. 304 (W.D. Ark. 1958), recognizing that the state practice of limiting claims against minors to probate proceedings prevented a federal court from allowing a creditor to maintain an equitable garnishment action.

gives execution on its own judgment and executes on property located within its own jurisdiction. Therefore the forum has no reason to look to the law of the locus as a model. It is well settled that such questions as immunity of property from attachment are determined by the *lex fori*.⁶²

Extent of Recovery.—When, however, the extent of recovery is involved, different considerations prevail. The question is not one of determining what remedy shall be awarded. The fact that *A* has wronged *B* is meaningless unless it is translated into a recovery in terms of dollars and cents. A determination of the extent of loss is no different from a determination of the existence of a wrong resulting in a loss. The amount of recovery clearly affects the outcome, since it involves the question of what *B* can ultimately get by way of compensation. No procedural policy of the forum can be involved—the trial is conducted in the same manner whether the plaintiff recovers \$1,000 or \$10,000. Under *Erie*, it has never been questioned that the measure of damages is determined by state law. It also seems to be generally accepted that the measure of damages is determined by the *lex loci* in a conflicts situation.⁶³ This includes punitive damages.⁶⁴ In *Dorr Cattle Co. v. Des Moines Nat'l Bank*,⁶⁵ however, the court held that the question of speculativeness of damages was governed by the *lex fori*. The decision can be explained, if at all, only on the grounds that the court would not permit recovery for injury to the type of interest involved, which was a credit rating. It is doubtful whether a case like this would be followed today.

Consider, though, a case such as *Kilberg v. Northeast Airlines, Inc.*⁶⁶ There the decedent, a New York domiciliary, boarded a plane in New York. The plane crashed in Massachusetts, and a wrongful death action was brought in New York.⁶⁷ The Massachusetts wrongful death statute set a maximum limit upon recovery. The New York court, relying on somewhat confusing and imprecise reasoning, held that the limitation did not apply. The court emphasized that the place of injury had been fortuitous and that since the decedent had been a New York domiciliary it would be against New York's public policy

62. See *Smith v. McAtee*, 27 Md. 420 (1867); Restatement, Conflict of Laws § 600 (1934).

63. *Commonwealth Fuel Co. v. McNeil*, 103 Conn. 390, 130 Atl. 794 (1925); *Stevens v. Missouri Pac. R.R.*, 355 S.W.2d 122 (Mo. 1962).

64. *Roseberry v. Scott*, 120 Kan. 576, 244 Pac. 1063 (1926); *Louisville & N.R.R. v. Lynch*, 137 Ky. 696, 126 S.W. 362 (1910).

65. 127 Iowa 153, 98 N.W. 918 (1905).

66. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

67. A count on the theory of breach of warranty was dismissed on the ground that the warranty did not give rise to a death action.

to permit the limitation on damages. This use of public policy to defeat a defense is quite questionable and is inconsistent with other New York cases.⁶⁸

The court in *Kilberg* based its decision on yet another ground, one which it felt would permit the implementation of New York's public policy without "doing violence to the accepted pattern of conflict of law rules."⁶⁹ Relying upon the general idea that the *lex fori* should govern as to matters of procedure, including remedies, the court indicated that there was authority both ways as to whether the measure of damages should be controlled by the *lex fori*.⁷⁰

Such reliance upon the substance-procedure distinction ignores the fact that there is a difference between the nature of the remedy to be awarded and the extent of recovery.⁷¹ The result reached in the case is, however, correct under Cook's theory of the nature of the conflict of laws. Assuming that the New York court found that Massachusetts would apply the limitation in a similar case, the New York court could still refuse to use that portion of Massachusetts law as a model and could determine limitation of damages in accordance with its own law.⁷² Massachusetts' contact was indeed largely fortuitous and New York had a substantial interest in the estate of its domiciliary. Thus, there would seem to be no constitutional objection to New York's applying its own law to determine the measure of damages.⁷³ The defendant would not be prejudiced by such a holding,

68. In *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938) (per curiam), the same court allowed the defendant in a breach of contract action to assert the defense that a statute of the locus required the discharge of persons of the Jewish faith from certain employment, even though the statute might have been against its public policy.

In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Supreme Court expressly drew the distinction between the use of the public policy technique to bar an action and a defense, saying that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." Note that if the forum decides it is but a forum of convenience, it would admit that nothing happened within its borders that it was entitled to control.

69. 9 N.Y.2d at 39, 172 N.E.2d at 528, 211 N.Y.S.2d at 135.

70. In disagreeing with this conclusion, Judge Froessel stated that the court was "undermining the accepted pattern of conflict of laws rules, in effect overruling numerous decisions of this court, and completely disregarding the overwhelming weight of authority in this country." 9 N.Y.2d at 46, 172 N.E.2d at 532, 211 N.Y.S.2d at 142.

71. It is well settled that limitations in death actions are part of the measure of damages. See Restatement, Conflict of Laws § 606(b) (1934).

72. In *Pearson v. Northeast Airlines, Inc.*, 199 F. Supp. 539 (S.D.N.Y. 1961), rev'd, 307 F.2d 131 (2d Cir. 1962), motion for rehearing en banc granted, Sept. 13, 1962, the lower court predicted that New York would apply its law of damages in a case involving the same facts, since the plaintiff was a New York domiciliary.

73. Subsequent to the preparation of this article I discovered that the United States Court of Appeals for the Second Circuit has disagreed with this position. In *Pearson v.*

since he could not have been relying on Massachusetts law prior to the crash.⁷⁴

Although the case may be justified on these grounds, it is not correct to say that the measure of damages is determined by the *lex fori*.⁷⁵ The measure of damages clearly affects the outcome and does not conflict with the procedural policy of the forum and should, for that reason, be determined by the *lex loci*. The case is valuable insofar as it points up the necessity of distinguishing between matters relating to the remedy and those relating to the extent of recovery.

The question of the rate of interest to be awarded will not arise under *Erie* because there is no conflicting federal law. For conflicts purposes, the proper result is exemplified by the holding in *Scotland County v. Hill*.⁷⁶ There it was held that interest on the claim should be determined by the *lex loci* while interest on the judgment should be determined by the *lex fori*. The amount of interest on the claim is part of the measure of damages, and no question of conflict with the

Northeast Airlines, 307 F.2d 131 (2d Cir. 1962), motion for rehearing en banc granted, Sept. 13, 1962, the court, reversing the case cited in note 72 supra, held that full faith and credit required New York to enforce the Massachusetts limitation. The rationale of the decision was that since New York had held that the plaintiff's rights were under the Massachusetts statute, full faith and credit required New York to enforce the statute in its entirety. The Second Circuit stated that public policy could not be used to destroy a defense. I agree with that. However, the court ignored the fact that there was no reliance in the case and that the Massachusetts contact was largely fortuitous. The defendant was in no way prejudiced because of reliance upon Massachusetts law. The court, as Judge Kaufman pointed out in his dissent, was applying the vested rights theory and, in effect, raising the doctrine of *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904), to a constitutional doctrine.

Judge Kaufman's dissent is excellent. Despite some references to "public policy," he accurately characterizes the problem and emphasizes the fortuitous nature of Massachusetts' contact. As he points out, the majority did not say that New York could not apply its statute, but stated that since it had chosen to apply the Massachusetts statute, it had to do it completely. Judge Kaufman criticizes the vested rights theory and shows how it has been discredited, making reference to Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942). 194 F.2d at 141. His point is that because of New York's interest New York may use its own law as a model on the issue of damages without running afoul of full faith and credit.

After reading the case, I choose to abide by my original statement and predict that if the case should come before the Supreme Court, Judge Kaufman's position will be sustained. In such a case it is imperative that the Court have a full understanding of the nature of Cook's theory and realize that it is compatible with the underlying principles of full faith and credit where the interest of the locus in the case is comparatively slight and the defendant is not prejudiced by the forum's failure to use the entire *lex loci* as a model. It should be noted, moreover, that the Second Circuit has granted a motion for rehearing en banc in the case.

74. This differentiates it from the problems discussed in note 68 supra and accompanying text.

75. It is submitted that the court will not extend the principle to other situations, but will hold that damages are ordinarily governed by the *lex loci*.

76. 132 U.S. 107 (1889).

forum's procedural policy can possibly exist.⁷⁷ The judgment, on the other hand, is given by the forum, and no interest will be owing if the judgment is paid promptly. Charging interest on judgments which are not paid promptly thus relates to enforcement of the judgment, and is analogous to execution.⁷⁸

Attorneys' Fees.—Attorneys' fees are also part of the measure of damages so far as recovery is concerned. For *Erie* purposes, the court looks to state law to determine whether an award may be made for attorneys' fees.⁷⁹ In a conflicts case, the law of the locus should govern this matter; for its determination materially affects the amount of recovery, and no procedural policy of the forum can be affected. Thus, in *Stokes v. Reeves*⁸⁰ the Montana federal district court correctly ruled that it would permit the recovery of attorneys' fees recoverable under the *lex loci*, although such fees were not recoverable under Montana law.

A different question is presented where the forum would authorize recovery of attorneys' fees in a particular case, but the locus would not. In *Aetna Cas. & Sur. Co. v. Simpson*,⁸¹ the forum applied its statute authorizing recovery of attorneys' fees against nonsettling insurers, even though no such recovery was permitted by the *lex loci*. The court reasoned that these fees were taxed as costs and that recovery of costs was governed by the *lex fori*.

It may be argued that to allow recovery of attorneys' fees represents an attempt by the forum to insure that litigants seeking to use its courts will not be deterred by the cost of retaining counsel. If recovery of attorneys' fees were authorized in all cases, then it might be argued that the forum's policy should control. But attorneys' fees are often authorized only in certain types of actions as a device to encourage the settlement of claims. If this is the case, then the forum's only concern is with those claims that its law governs and not with all claims brought before its courts. Therefore, the *lex fori* governing costs should not be applied when, by definition, the forum only hears the case as a matter of convenience.

77. See *Frasier v. Public Serv. Interstate Transp. Co.*, 254 F.2d 132 (2d Cir. 1958) (applying New York law). Contra, *Hays v. Arbuckle*, 72 Colo. 328, 211 Pac. 101 (1922), holding that all questions of interest are determined by the *lex fori*.

78. But see *Sylvania Elec. Prods. v. Barker*, 228 F.2d 842, 851 (1st Cir. 1955), cert. denied, 350 U.S. 988 (1956) (applying Massachusetts law), holding that interest on the verdict is determined by the *lex loci*. No reasoning was given, and it is doubtful if the state court would agree.

79. *Stokes v. Reeves*, 245 F.2d 700 (9th Cir. 1957); *American Optometric Ass'n v. Ritholz*, 101 F.2d 883 (7th Cir.), cert. denied, 307 U.S. 647 (1939).

80. *Stokes v. Reeves*, 245 F.2d 700, 702, 704 (9th Cir. 1957).

81. 228 Ark. 157, 306 S.W.2d 117 (1957).

Arbitration.—The question whether a court should order arbitration has also been said to relate to the remedy. That is sound only to this extent: lacking authority, the forum cannot order arbitration even where the courts at the locus have such authority. This is another case in which the law of the locus cannot be taken as a model because the forum lacks the judicial machinery to enforce the interest created by the locus. But this does not justify the result in a case such as *Shafer v. MGM Distrib. Corp.*,⁸² where the court, in refusing to entertain an action on an arbitrator's award, declared that whether such agreements are enforceable is a question of procedure to be determined by the *lex fori*. The forum in that case was not being asked to enforce the agreement by ordering arbitration. It was merely being asked to enforce the award as any other judgment. Since the forum was not called upon to employ judicial machinery it did not have, the question of whether the forum could grant the remedy should never have arisen.

The characterization of arbitration as a remedies question to be decided by the *lex fori* leads to a correct result only where the forum lacks the machinery to order arbitration. The reverse of the question is presented when the forum can order arbitration, but when arbitration would not or could not be ordered by the locus. Should the forum order arbitration in such a case? The question was presented in an *Erie* context in *Bernhardt v. Polygraphic Co. of America*.⁸³ Under state law, arbitration could not be compelled. The plaintiff sought relief under the Federal Arbitration Act. Jurisdiction was based on diversity of citizenship, for the transaction did not involve interstate commerce. The court held that if arbitration could not be compelled in the state court, it could not be compelled in the federal court. It was further held that the federal arbitration statute is inapplicable where jurisdiction is based solely on diversity of citizenship.⁸⁴

In concluding that the outcome of the case would be materially

82. 36 Ohio App. 31, 172 N.E. 689 (1929).

83. 350 U.S. 198 (1956).

84. If *Erie* represented a constitutional doctrine, then the Federal Arbitration Act would be unconstitutional as applied to such a situation. The Court construed the statute narrowly to avoid raising the constitutional question. Subsequently it has been held that the act creates an independent federal right to arbitration in a transaction involving maritime matters or interstate commerce. Thus it was applicable, even though the suit was based on diversity rather than some other basis of jurisdiction. *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir.), cert. denied, 368 U.S. 817 (1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), petition for cert. dismissed per stipulation, 364 U.S. 801 (1960). The Supreme Court has not yet passed on this question. See an excellent discussion of the problem in Note, *Erie, Bernhardt, and Section Two of the United States Arbitration Act*, 69 Yale L.J. 847 (1960).

affected by the decision as to whether to order arbitration, the court emphasized that a trial before an arbitrator is entirely different from a trial before a court. There is no jury trial in arbitration proceedings; arbitrators do not have judicial instruction in the law; they do not always have to give reasons for the result; and judicial review of arbitration awards is sharply limited. More significantly, the result in arbitration proceedings is determined in accordance with commercial practices, not all of which would be relevant in a court action. The *Bernhardt* rationale is equally applicable in a conflicts situation. The procedural policy of the forum is not involved because nothing takes place in the forum if arbitration is not ordered. Because the ordering of arbitration can significantly affect the outcome, the forum should not do so when the locus would not.

The next question is the effect of a failure to arbitrate as a bar to an action on the contract. The time has passed when arbitration agreements were considered illegal because they ousted courts of jurisdiction. However, some courts will still disregard the agreement to arbitrate and will entertain an action on the contract. Other courts hold that failure to arbitrate is a defense to an action on the contract. If an action would be barred at the locus because of failure to arbitrate, it should not be entertained at the forum. Thus, in *Miller v. American Ins. Co.*⁸⁵ the court held that the forum had no legitimate interest in entertaining such an action because the contract was made and was to be performed elsewhere. The court was concerned with the protection of its residents who had refused to submit to arbitration. The fact that a forum is hostile to agreements which oust courts of jurisdiction should assume no importance when the case is being heard only as a convenience. No procedural policy of the forum can be affected by the forum's refusal to hear the case. This fact is ignored by courts which continue to allow actions which could not be maintained at the locus because of a failure to arbitrate.⁸⁶

Where the action would be barred at the forum but not at the locus, the forum's policy of avoiding the overcrowding of its courts may come into play. However, if failure to arbitrate is the sole reason for refusing to entertain the action, it is difficult to see how this policy is significantly affected. Where forum policy is not affected, the outcome should be the same as if the case had been brought at the locus.

In summary, the remedy given is to be determined by the *lex fori* only where the forum does not have the judicial machinery to grant

85. 124 F. Supp. 160 (W.D. Ark. 1954) (applying Arkansas law).

86. See, e.g., *Electrical Research Prods., Inc. v. Vitaphone Corp.*, 20 Del. Ch. 417, 171 Atl. 738 (Sup. Ct. 1934); *Meacham v. Jamestown, F. & C.R.R.*, 211 N.Y. 346, 105 N.E. 653 (1914).

the relief sought or where a choice must be made between specific relief and damages. Where the questions before the court affect the amount of recovery or determine whether suit can be maintained, the *lex loci* should be incorporated unless it conflicts with a strong procedural policy of the forum.

Pleading

Ordinarily, pleading matters will not materially affect the outcome. It would seriously interfere with the efficient operation of the forum's judicial system if the court were required to follow all the "pleading intricacies" of the locus.⁸⁷ This is equally applicable to cases in the federal courts. For *Erie* purposes federal law has been held to govern such questions as whether the complaint states a cause of action;⁸⁸ whether the defendant is entitled to a more definite statement;⁸⁹ whether matters must be alleged with particularity;⁹⁰ whether a defense can be raised on a motion to dismiss;⁹¹ whether certain items are required to be pleaded;⁹² and whether special interrogatories are to be submitted to the jury.⁹³ Thus, the general rule in conflicts that all matters of pleading are determined by the *lex fori*⁹⁴ is ordinarily sound.

Amendment of pleadings will ordinarily not materially affect the outcome. Thus, the *lex fori* determines whether it is permissible to amend a complaint to seek relief against a defendant as an individual rather than a representative.⁹⁵ The only question in such a situation would be whether the plaintiff should be required to institute another suit. A different case is presented where the amendment has the effect of introducing a new cause of action which would be barred by the statute of limitations if amendment were not permitted. Whether the amendment relates back to the original date of filing is a question which materially affects the outcome, for this determines whether suit can be maintained on the claim. The courts have been split

87. See Cook, *The Logical and Legal Bases of the Conflict of Laws* 169 (1942).

88. *Ramsel v. Ring*, 173 F.2d 41 (8th Cir. 1949). Obviously, state law governs as to what constitutes a cause of action.

89. *Smedley v. Guy F. Atkinson Co.*, 12 F.R.D. 355 (D. Neb. 1951).

90. *Sims v. United Pac. Ins. Co.*, 51 F. Supp. 433 (D. Idaho 1943).

91. *Kincheloe v. Farmer*, 214 F.2d 604 (7th Cir. 1954), cert. denied, 348 U.S. 920 (1955).

92. *Kincheloe v. Farmer*, supra note 91; *Empresa Agricola Chicama, Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944).

93. *Garland v. Lane-Wells Co.*, 185 F.2d 857 (5th Cir. 1950); *Cohen v. Travelers Ins. Co.*, 134 F.2d 378 (7th Cir. 1943).

94. *Restatement, Conflict of Laws* § 592 (1934).

95. *Martin v. Talcott*, 1 App. Div. 2d 679, 146 N.Y.S.2d 784 (2d Dep't 1955) (mem.). There was no question of the statute of limitations having run.

on this issue in the *Erie* situation. Even though it was not permissible under state law, the court in *Barthel v. Stamm*⁹⁶ permitted relation back on the ground that the defendant received adequate notice. Moreover, the court also indicated that when suit was filed in the federal court, the defendant should have known that amendments would relate back. A contrary result was reached in *L. E. Whitham Constr. Co. v. Remer*,⁹⁷ and *Nola Elec. Co. v. Reilly*,⁹⁸ on the ground that the matter materially affected the outcome.⁹⁹ This is the sounder view. It is of no import that a defendant has actually received notice. Such notice would not bind him in the state court, and that suit has been brought in the federal court should not alter this result. The same should be true in the conflicts situation. If amendment is barred at the locus, it should be barred at the forum. Otherwise, the forum would be permitting the maintenance of an action that could not be maintained at the locus. We are proceeding on the assumption that if suit is barred by the statute of limitations of the locus, it should also be barred at the forum.¹⁰⁰ Amendment should not be permitted if it is barred under the *lex fori*, even though it would be permitted under the *lex loci*. The forum's procedural policy regarding the adequacy of notice and the application of the statute of limitations would otherwise be obstructed. The point to be remembered, though, is that the amendment of pleadings may materially affect the outcome.

Professor Cook has demonstrated that the form of action that is employed may materially change the result.¹⁰¹ The general rule, however, is that the form of action is determined by the *lex fori*.¹⁰² Today, although forms of action have generally been abolished, the theories supporting the various forms have been retained. These theories may materially affect the outcome of a case. For example, whether the injured party may waive a tort and bring an action in assumpsit may determine the survival of an action¹⁰³ or the measure of damages to be applied.¹⁰⁴ There is no way in which the theory of the case can affect the procedural policy of the forum. Thus, where the theory of

96. 145 F.2d 487 (5th Cir.), cert. denied, 324 U.S. 878 (1944).

97. 105 F.2d 371 (10th Cir. 1939).

98. 93 F. Supp. 164 (S.D.N.Y. 1949).

99. In *Freeman v. Bee Mach. Co.*, 319 U.S. 448 (1943), it was held that whether an amendment involving a federal claim could be made to relate back when jurisdiction was originally founded on diversity, was determined by federal law.

100. This problem is treated in detail in text accompanying notes 146-71 *infra*.

101. Cook, *The Logical and Legal Bases of the Conflict of Laws* 173-74 (1942).

102. Restatement, *Conflict of Laws* § 587 (1934).

103. Cook, *The Logical and Legal Bases of the Conflict of Laws* 176 (1942).

104. See *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929).

the case materially affects the outcome, the forum should use the *lex loci* as a model.

In summary, pleading matters will ordinarily be determined by the *lex fori*. Where they will materially affect the outcome, however, such matters should be determined with reference to the *lex loci*, absent countervailing considerations.

Maintenance of Suit

Real Party in Interest.—Ordinarily, identification of the real party in interest for purposes of maintaining the suit will not materially affect the outcome. Thus, whether a partial assignee can proceed against the debtor is determined by the *lex fori*.¹⁰⁵ The question is really one of practicability. The basis for the traditional equity rule permitting a partial assignee to sue was the impossibility of insuring that all the parties could be joined in the same action. In an interstate case, where joinder of all parties is difficult to obtain, the forum is in the best position to determine whether all parties can be joined. For this reason the law of the forum must govern as to whether a partial assignee can sue.¹⁰⁶

On the other hand, if suit is barred unless brought by certain parties, the identification of the real party in interest materially affects the outcome and should be determined by the *lex loci*. The best example is a suit under a wrongful death statute.¹⁰⁷ In such a case no action can ever be maintained unless it is brought by the parties plaintiff designated by statute. In situations in which the identity of the party plaintiff or party defendant affects the amount of recovery, questions such as joinder should be determined by the *lex loci*. Thus, in *Mosby v. Manhattan Oil Co.*,¹⁰⁸ it was held that the plaintiff could maintain an action against one joint tortfeasor without joining the other, since under the *lex loci* each defendant was liable for the full amount of the injury. Under the *lex fori*, each would have been liable only for his proportionate share, and joinder would have been required in order to apportion liability. Since the liability issue was determined with reference to the *lex loci*, the court also found it necessary to incorporate the joinder law of the locus in order to give the plaintiff full recovery.

105. See, e.g., *Howard Undertaking Co. v. Fidelity Life Ass'n*, 59 S.W.2d 746 (Mo. Ct. App. 1933).

106. For further examples see the illustrations in Restatement, Conflict of Laws § 588 (1934).

107. See *Murray v. New York, O. & W.R.R.*, 242 App. Div. 374, 275 N.Y. Supp. 10 (1st Dep't 1934).

108. 52 F.2d 364 (8th Cir. 1931).

Impleader.—Two *Erie* cases demonstrate how impleader can materially affect the outcome of a case. In *Brown v. Cranston*,¹⁰⁹ the federal court applied state law, which provided that a joint tortfeasor could not be made a party defendant on the motion of the original defendant. Under state law, one joint tortfeasor had no right to contribution against the others unless he had paid more than his share of a *joint* money judgment against them. Therefore, to have permitted joinder would have materially affected their rights *inter se*. For that reason, state law was held to be controlling. In *D'Onofrio Constr. Co. v. Reconstruction Co.*,¹¹⁰ joinder was permitted in the original action, even though it might not have been permissible under state law. State law recognized a right to contribution among joint tortfeasors regardless of whether judgment had been recovered against them. Allowing joinder could in no way affect the right to contribution. Joinder merely permitted determination of all issues in a single action. The same approach should be taken by a court in a conflicts case, and joinder should be permitted only when it is permissible under the *lex loci*, or when it does not affect the right to contribution.

Substitution of Parties and Survival of Actions.—Substitution of parties does not appear to affect the outcome of a suit, assuming that the action can be continued whether or not the administrator is formally substituted. The only effect would seem to be upon costs, which are determined by the *lex fori* in any event. Therefore, the *lex fori* should govern as to formal substitution of parties.¹¹¹ Obviously, whether an action survives the death of one of the parties materially affects the outcome, since it determines whether any recovery can be had at all. It is well settled that survival is determined by the *lex loci*.¹¹² If the forum is concerned with protecting the estates of its domiciliaries, it may characterize the issue of survival as one of decedent estate law and apply the *lex domicilii*. However, where the court is merely serving as a forum of convenience, it should not apply its own law to matters which determine whether there will be recovery. The same reasoning is applicable to the issue of spousal immunity, since immunity prevents recovery. Although courts are split as to whether this issue is

109. 132 F.2d 631 (2d Cir. 1942), cert. denied, 319 U.S. 741 (1943).

110. 255 F.2d 904 (1st Cir. 1958).

111. This is decided by Fed. R. Civ. P. 25 in the *Erie* situation. *Iovino v. Waterson*, 274 F.2d 41 (2d Cir. 1959), cert. denied, 362 U.S. 941 (1960).

112. The point has been involved in a number of cases, and the result has been the same. See *Ormsby v. Chase*, 290 U.S. 387 (1933); *Butcher v. Maffeo*, 225 F.2d 713 (9th Cir. 1955) (applying Arizona law); *Yount v. National Bank*, 327 Mich. 342, 42 N.W.2d 110 (1950); *Kertson v. Johnson*, 185 Minn. 591, 242 N.W. 329 (1932); *Friedman v. Greenberg*, 110 N.J.L. 462, 166 Atl. 119 (Ct. Err. & App. 1933); *Coster v. Coster*, 289 N.Y. 438, 46 N.E.2d 509 (1943).

to be determined by the *lex loci delicti*¹¹³ or the *lex domicilii*,¹¹⁴ it is agreed that it is to be determined with reference to the law of some locus and not by the *lex fori*.¹¹⁵

Direct Action Statutes.—A twofold problem exists with respect to statutes permitting direct action against insurers. One problem arises when the forum has a direct action statute and the locus does not, and the forum's statute is applied on the ground that the *lex fori* governs as to parties. The other arises when such a statute exists only at the locus, and the forum is asked to permit suit against the insurer. It has been recognized in the *Erie* cases that the matter materially affects the outcome.¹¹⁶ There is great controversy as to the propriety of allowing the jury to know that a defendant is insured. Whether a direct action can be maintained may well affect the amount of the jury's award or the amount which will be taken in settlement. It is necessary to consider the procedural policy of the forum. A direct action statute in the forum may represent a policy designed to prevent juries from reducing the verdict out of sympathy with the defendant and to guarantee that judgments will be paid in full by insurers. Conversely, the absence of a direct action statute may mean that the forum considers it highly prejudicial to the insurer to allow the jury to know that the defendant is insured. These conflicting approaches have led to a split on this issue. Some courts dealing with the problem have considered the procedural policy of the forum at length, while others have not considered it at all.

In *Kertson v. Johnson*,¹¹⁷ for example, the court applied the direct action statute of the locus which allowed a suit to be maintained against the insurer before the cause of action was reduced to judgment.¹¹⁸

113. See, e.g., *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931).

114. *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959), overruling *Buckeye v. Buckeye*, 203 Wis. 248, 234 N.W. 342 (1931).

115. *Bohenek v. Niedzwiecki*, 142 Conn. 278, 113 A.2d 509 (1955), pointed out that it was immaterial whether the parties were married at the time of suit or subsequently. In *Boisvert v. Boisvert*, 94 N.H. 357, 53 A.2d 515 (1947), the court applied the principle to prohibit suit against the insurer, though the locus authorized a direct action against him. Since there was no action against the spouse, it predicted that the locus would not permit one against the insurer. This is quite sound, since one of the purposes of spousal immunity is to protect the insurer from possible collusion.

116. Few cases have actually discussed the point. See *Collins v. American Auto. Ins. Co.*, 230 F.2d 416 (2d Cir.), petition for cert. dismissed on motion of petitioner, 352 U.S. 802 (1956); *Pitcairn v. Rumsey*, 32 F. Supp. 146 (W.D. Mich. 1940). In *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 (1954), in holding that diversity need only exist between the insurer and the plaintiff, the Supreme Court assumed that state law determined the amenability of the insurer to suit.

117. 185 Minn. 591, 242 N.W. 329 (1932).

118. *But in Anderson v. State Farm Mut. Auto. Ins. Co.*, 222 Minn. 428, 24 N.W.2d 836 (1946), where the insurance contract had a "no-action" clause, and the locus con-

There was no discussion of possible conflict with the forum's procedural policy. In *Collins v. American Auto. Ins. Co.*,¹¹⁹ a federal court, after deciding that the issue was to be determined by state law, predicted that New York would apply the direct action statute of the locus. The court recognized that the locus had characterized this issue as procedural but pointed out that the decision was made for local law purposes. However, the reason given for reference to the law of the locus was not that the issue affected the outcome. Rather, the court stated that the statute created a new cause of action. Moreover, there were certain defenses that could be asserted by the insurer but not by the wrongdoer. Since it did not discuss directly the prejudicial aspect of disclosure of insurance coverage to the jury, the court clearly did not consider New York's procedural policy.

A New York state court did consider the policy aspect of the problem in *Morton v. Maryland Cas. Co.*¹²⁰ It conceded that the statute was "substantive" for conflicts purposes because of its effect upon the outcome, but said that New York's "public policy" precluded enforcement.¹²¹ The court did not emphasize New York's procedural policy. The claim itself would not violate public policy in the sense in which the concept has traditionally been employed by the New York courts.¹²² Apparently the court was actually concerned with New York's policy against permitting the jury to be informed as to insurance coverage. The procedural policy of the forum was partially recognized by the Supreme Court of Texas in *Penny v. Powell*.¹²³ There the court refused to enforce the direct action statute of the

strued the statute as not authorizing a direct action against the insurer until the claim against the insured had been reduced to judgment, the forum would not permit the action until such time. However, an amendment to the statute of the locus did permit joinder. The court held the amendment inapplicable on the ground that the locus had construed the amendment as "procedural" in a case involving an issue of local law. See also *Lundblad v. New Amsterdam Cas. Co.*, 265 Mass. 158, 163 N.E. 874 (1928), permitting a direct action against the insurer after the claim against the insured had been reduced to judgment, which was the practice under the *lex loci*, though under the *lex fori*, the plaintiff would have had to bring a suit for equitable relief against both. This would materially affect the outcome if service could not be had against the insured in the forum, so the result is sound.

119. 230 F.2d 416 (2d Cir.), petition for cert. dismissed on motion of petitioner, 352 U.S. 802 (1956).

120. 1 App. Div. 2d 116, 148 N.Y.S.2d 524 (2d Dep't 1955), aff'd, 4 N.Y.2d 488, 151 N.E.2d 881, 176 N.Y.S.2d 329 (1958).

121. An alternative ground, that in Louisiana suit had to be brought in specified parishes, is fallacious, as venue requirements of the locus have never been thought to prevent the action's being a transitory one. See *Tennessee Coal, Iron & R.R. v. George*, 233 U.S. 354 (1914).

122. See the test enunciated in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110-11, 120 N.E. 198, 201 (1918).

123. 347 S.W.2d 601 (Tex. 1961).

locus, emphasizing the fact that the forum's procedural rules expressly prohibited the joinder of insurer and insured in tort cases, though apparently not in contract cases. By prohibiting joinder, the forum had decided that it considered the question to be determined by the *lex fori*. While noting that the forum had construed the statute as procedural, the court failed to take into account that the characterization had been made local law rather than conflicts situations.

In *Lieberthal v. Glens Falls Indem. Co.*¹²⁴ the court refused to use the locus' direct action statute as a model and expressly declined to say whether the question was one of substance or procedure. The court declared that if the question were one of substance, public policy considerations would preclude maintenance of the suit. More significantly, the court emphasized the forum's statute prohibiting suit against the insurer and any reference to insurance during the trial. The forum's fear that the plaintiff would obtain an excessive and unjust verdict was noted. The statute was construed as protecting all insurers who were before the forum. Another approach has been simply to characterize the statute as procedural on the ground that the locus has done so.¹²⁵ This approach fails to take into account the fact that cases relied upon have made the substance-procedure distinction solely for local law purposes.

So much for the problem of deciding whether to apply the direct action statute of the locus. The converse problem—whether to apply the forum's direct action statute to foreign cases—has not been litigated to any great extent. The only case which apparently exists on the subject, *Weingartner v. Fidelity Mut. Ins. Co.*,¹²⁶ held that Louisiana's statute was limited to accidents occurring there. The court stated that the matter was one of substance, and that no suit could be maintained since there was no authorizing statute at the locus.

It is submitted that the approach taken in *Weingartner* is the proper one and that the question should be answered with reference to the *lex loci*. Although it is the forum's responsibility to insure fairness, states can and do differ on the issue of whether fairness can be best achieved by permitting or prohibiting suit against the insurer. Courts tend to make a fetish of the issue of insurance coverage. The matter does materially affect the outcome, and it must be remembered that the forum is but one of convenience. In other words, where states

124. 316 Mich. 37, 24 N.W.2d 547 (1946).

125. *McArthur v. Maryland Cas. Co.*, 184 Miss. 665, 186 So. 305 (1939). The case was reaffirmed in *Cook v. State Farm Mut. Ins. Co.*, 241 Miss. 371, 128 So. 2d 363, cert. denied, 368 U.S. 898 (1961).

126. 205 F.2d 833 (5th Cir. 1953).

differ as to the question of unfairness, and there are valid arguments on both sides, the procedural policy involved should not be deemed a strong one. In addition to the question of the size of the verdict, it must be remembered that a direct action statute seeks to give the plaintiff greater rights against the insurer. Therefore, the forum should determine the question of a direct action with reference to the *lex loci*.

Conditions Precedent to Suit.—The same two-fold aspect is presented in cases involving conditions precedent to suit. One such situation involves the question of whether a stockholder can maintain an action against a corporation without complying with a condition imposed by the *lex loci*, which is generally the state of incorporation. In *Hausman v. Buckley*,¹²⁷ the law of the state of incorporation permitted a stockholder derivative suit only if the plaintiff had the approval of a majority of the stockholders. There was no such requirement at the forum. The court observed that this rule reflected a policy of the locus that such a suit should be brought only if a majority of the stockholders felt that the corporate welfare would be thereby promoted. The issue, according to the court, was “not just ‘who’ may maintain an action or ‘how’ it will be brought, but ‘if’ it will brought.”¹²⁸ The court drew an analogy to *Cohen v. Beneficial Industrial Loan Corp.*,¹²⁹ where it was held that a state statute requiring that a stockholder in a derivative suit post security for costs was binding on a federal court in a diversity case. Such a requirement was said to “condition the stockholder’s action.” A similar result was reached in *Steinberg v. Hardy*,¹³⁰ where state law was held to determine the extent to which an effort to obtain action by the corporation was a necessary prerequisite to the maintenance of a shareholder’s derivative suit. The result in the *Hausman* case is sound. The requirement relates directly to whether the suit can be maintained. No procedural policy of the forum is involved because nothing happens in its courts if it does not entertain the suit.

If the forum requires derivative suits to have the approval of a majority of the shareholders, but the locus does not, it is submitted that the forum has no legitimate interest in the question. The forum’s rule is not designed to prevent suits merely in order to reduce the volume of litigation in the forum. Rather, it is a device to protect the corporation from dissident shareholders. Once the forum has decided that the law of another state governs the corporation-stockholder rela-

127. 299 F.2d 696 (2d Cir.), cert. denied, 369 U.S. 885 (1962).

128. Id. at 701.

129. 337 U.S. 541 (1949).

130. 90 F. Supp. 167 (D. Conn. 1950).

tionship, it has no interest in protecting the corporation. Therefore, the question should be determined exclusively with reference to the *lex loci*.

Another condition which is sometimes placed on the privilege of bringing a stockholder's derivative suit is the requirement of posting security for costs. If the law of the forum permits suit without the posting of security, its procedural policy should yield to the interest of the locus. The locus, probably the state of incorporation, has determined to protect its corporations from dissident shareholders who do not have a sufficient interest in the suit or the corporation to give security for costs. The state of incorporation wants the shareholder to show that he is serious. This policy would seem to be entitled to greater weight than the forum's policy of opening its doors to all. Again, it is difficult to see how the forum's procedural policy can be seriously affected if the law of the locus is followed and no suit takes place.

Even where it requires the posting of security, the forum has no legitimate interest in protecting the corporation once it decides that the corporation-stockholder relationship should be governed with reference to the law of another state. As the *Cohen* case indicates, the requirement of security for costs can materially affect the outcome; for many plaintiffs in derivative actions allow suit to be dismissed rather than post security. Since it materially affects the outcome, and since the forum has no real interest in it, the matter should be determined with reference to the *lex loci*.¹³¹

Further conflicts problems arise where a corporation is not permitted to sue because of failure to register or failure to comply with certain other statutes.¹³² Again the problem is two-fold: Should the forum apply its noncompliance statute where it is but a forum of convenience? And should the forum refuse to entertain an action by a corporation because of noncompliance with the law of the locus? The latter question is answered by *Woods v. Interstate Realty Co.*¹³³

131. Mr. Ailes observed that although security-for-costs requirements frequently result in the plaintiff's being denied any relief at all, "yet it is doubtful whether the most extreme 'realist' would assert that such things relate to the substance of a party's case." Ailes, *Substance and Procedure in the Conflict of Laws*, 39 Mich. L. Rev. 392, 409 (1941). The point Mr. Ailes has ignored is that the question is not one of what is analytically substantive or procedural.

132. Where the transaction sued on involves solely interstate commerce, the forum cannot, consistently with the negative aspects of the interstate commerce clause, bar suit on the transaction. *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). Cf. *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1943), where the corporation carried on other activities in the state and localized its business there, even though the particular transaction involved interstate commerce.

133. 337 U.S. 535 (1949).

There it was held that a corporation which could not sue in the state court because of failure to comply with its laws could not maintain the action in the federal court in a diversity case. Whether or not a party can recover was said to affect the outcome in the most material way possible. As the court observed, "a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court."¹³⁴ However, in *Allen v. Alleghany Co.*,¹³⁵ it was held that suit would not be barred in a conflicts case unless failure to comply made the obligation "void" at the locus. This ignores the point emphasized in *Woods*—the outcome in the locus would still be that the suit cannot be maintained. Since the forum is hearing the case only as a convenience, the result should be no different there. Again, no procedural policy of the forum can be affected by dismissing the case.

Where the corporation has failed to comply with the forum's statutory requirements, the suit should be barred even though it could be maintained under the *lex loci*. Denial of access to the courts is the forum's chief means of compelling compliance with its corporation law. It is immaterial whether the forum is hearing the case as a matter of convenience; it is immaterial whether the claim arose in the forum or elsewhere. The point is that the forum will not open its doors to a noncomplying corporation. The forum is not concerned with what the locus would do. Failure to comply is a violation of the law of the forum, not the law of the locus. This problem does not arise under *Erie* because there is no federal statute requiring registration or other acts of compliance as the price of access to the federal courts.¹³⁶

Another condition for the maintenance of a suit may be a requirement of notice to the other party prior to suit. For example, it may be required that the defendant in a defamation action be given the opportunity to retract before the action can be commenced. Again, this may be a requirement of either the forum or the locus. For *Erie* purposes, it is clear that this is determined by state law.¹³⁷ The issue materially affects the outcome; for it determines whether or not suit can be maintained. Research has disclosed no cases involving such a requirement of the locus. But the same courts which have held that

134. *Id.* at 538.

135. 196 U.S. 458 (1905).

136. If a federal statute required registration, this would prevail over state law, as suming the activities of the corporation affected interstate commerce. By the same token, I would assume that under its interstate commerce power, Congress could void such requirements applicable to both the state and federal courts, where the activities of the corporation affected interstate commerce.

137. *Tademy v. Scott*, 157 F.2d 826 (5th Cir. 1946); *Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850 (S.D. Cal. 1954).

the question is determined by state law for *Erie* purposes have also predicted that the state courts would hold that the requirements on the locus are applicable in a conflicts situation.¹³⁸

Where the locus has such a requirement and the forum does not, then the action clearly should be barred. The question of whether suit can be maintained obviously affects the outcome materially, and no procedural policy of the forum can be involved, as we have indicated previously, when nothing happens in its courts. However, the results in the cases involving application of the forum's requirement are questionable. In *Arp v. Allis-Chalmers Co.*,¹³⁹ the law of the forum provided that an action for personal injuries could not be maintained unless notice were given within a year. The court drew an analogy to statutes of limitation in holding the notice requirement applicable to a cause of action arising outside the state. This decision can be sustained only on the grounds that such notice is necessary to enable the defendant properly to defend the action. In personal injury litigation freshness of evidence may be short-lived. It may be necessary for the defendant to know that he is going to be sued so that he can gather evidence. If this is the basis of the requirement, then it can be said to represent a strong procedural policy of the forum—the defendant is adversely affected whether the cause of action arose in the forum or elsewhere. Since the case will be tried in the forum, the forum must guarantee to the defendant adequate notice.

This rationale cannot be used to justify the result in a case such as *Shores-Mueller Co. v. Palmer*.¹⁴⁰ That case involved a statute of the forum which provided for discharge of a surety's liability unless the creditor sued the principal within thirty days of receiving notice to do so from the surety. The court held that this statute was applicable in a conflicts case. There was no question of unfairness to the surety in permitting suit. The statute merely regulated the relationship between surety and creditor and provided another ground for discharge. It is difficult to see how such a statute could be applicable in a case where the forum has no interest in the suretyship relation.

The same is true of the libel cases involving statutes requiring a demand for retraction before bringing suit. A statute of this sort is not

138. In *Tademy v. Scott*, *supra* note 137, the forum's statute making it a condition precedent to a libel action that the plaintiff give the publisher notice of the libel and make a demand for retraction was applicable to libels published elsewhere. In *Anderson v. Hearst Publishing Co.*, *supra* note 137, the court reached the same result, saying that it was against the forum's public policy to permit such recovery without such notice and demand.

139. 130 Wis. 454, 110 N.W. 386 (1907).

140. 141 Ark. 64, 216 S.W. 295 (1919).

designed to put the defendant on notice of the impending suit, for he will be aware of the libelous nature of the publication and will possess the evidence relating to it. The purpose of such a statute is simply to enable the defendant to mitigate his damages by a retraction. Thus, where the forum does not look to its own law to determine the measure of damages, the statute of the forum should have no relevance. The libel cases, along with the cases dealing with other conditions precedent, indicate that the following proposition may be used as a rough general principle to guide in the solution of the problems raised. Unless the fulfillment of the condition required by the forum can be said to be necessary to a fair trial, the question of whether to impose any condition precedent to suit should be determined with reference to the *lex loci*; for the matter is one which directly affects the outcome of the case.

The outcome is also affected by the question of whether the plaintiff has split his cause of action or has elected an inconsistent remedy in a previous suit. This has been recognized in the *Erie* situation,¹⁴¹ since it determines whether the second suit can be maintained. This reasoning is equally applicable in a conflicts situation. *Gentry v. Jett*¹⁴² involved the question of whether a plaintiff should be permitted to bring an action against one joint tortfeasor after having recovered against the other. The court held that this must be determined with reference to *lex loci*.¹⁴³ In a case where suit would be barred at the forum and not at the locus, the forum's procedural policy against allowing more than one suit would not seem to be so strong as to justify a departure from the result at the locus.

Whether a prior suit must be instituted before a particular type of suit can be maintained is not a question for determination by reference to the *lex loci*, for it does not affect the ultimate result. Unlike the previously considered situations where suit was barred, under these circumstances a suit can eventually be maintained. This issue was presented in *Huntress v. Huntress' Estate*.¹⁴⁴ There it was held that the federal court was not bound by the state practice of requiring that a judgment be obtained and execution returned unsatisfied before a creditor's bill could be maintained. The section of the Federal Rules¹⁴⁵

141. *Berger v. State Farm Mut. Ins. Co.*, 291 F.2d 666 (10th Cir. 1961); *Gentry v. Jett*, 273 F.2d 388 (8th Cir. 1960).

142. *Supra* note 141 (applying Oklahoma law).

143. *Accord*, *Coy v. St. Louis & S.F.R.R.*, 186 Mo. App. 408, 172 S.W. 446 (1914), where the first suit was brought in another state and the second in the forum. The cause of action arose in the forum.

144. 235 F.2d 205 (7th Cir. 1956).

145. Fed. R. Civ. P. 18(b).

providing for prosecution of two claims in a single action where one of them can be maintained only after the other is prosecuted to a conclusion was regarded as having no material effect upon the outcome. Thus the sole issue in such a case is one of the time when the suit can be commenced. This same reasoning is, of course, applicable in a conflicts situation. The forum must be free to decide the time at which the result of a controversy is to be determined.

Time Limitations

Here again, we are looking at two sets of limitations, those of the forum and those of the locus. If the action is barred by both, either because the time limitations have run at both places or because the forum has a borrowing statute,¹⁴⁶ there is no problem. But often the action is barred by only one.

Statutes of limitation have traditionally been classified as "procedural." For this reason, the statute of the forum alone is controlling, and that of the locus is not considered.¹⁴⁷ This is a result of the peculiarly Anglo-American concept of a "right without a remedy." Under this theory, *some* statutes of limitation are held merely to prevent suit upon a claim at the locus. The right continues to exist; only the remedy has been destroyed. This theory is significant in the conflicts situation because it allows a suit which is barred at the locus to be maintained in another state which has a longer limitation period.¹⁴⁸

Since statutes of limitation only affect the remedy, they have been construed as "procedural" for conflicts purposes. We may be confronted here with a "prior hatching" situation. Are statutes of limitation "procedural" for conflicts purposes because they destroy only the remedy and not the right? Or do they destroy only the remedy and not the right because they are procedural for conflicts purposes?

146. Borrowing statutes provide that the shorter limitation of the locus is to prevail if the cause of action would be barred there but not at the forum. See Restatement, Conflict of Laws § 604, comment b (1934). For a discussion of the operation of borrowing statutes, see *Nolan v. Transocean Air Lines*, 276 F.2d 280 (2d Cir. 1960), vacated and remanded per curiam, 365 U.S. 293, aff'd on rehearing, 290 F.2d 904 (2d Cir.), cert. denied, 368 U.S. 901 (1961). The purpose is to prevent forum shopping and the statute is construed usually as to bar the action if the question is in doubt. See *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655, appeal dismissed per curiam for want of federal question, 313 U.S. 549 (1941), where the forum's notion of the effect of a seal was applied to bar the action under the shorter statute for nonsealed instruments of the locus, though it was not barred under the statute of the locus relating to instruments under seal, and the locus considered the instrument sealed.

147. See Restatement, Conflict of Laws § 603 (1934).

148. It may also have some significance on the question of consideration in contract law and perhaps some other areas. Still, if the right-remedy distinction were abolished for conflicts purposes, it is doubtful if it would remain in other areas.

Professor Lorenzen's criticism of the right-remedy distinction appears to be unanswerable. He observed that: "A right which can be enforced no longer by an action at law is shorn of its most valuable attribute. After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere."¹⁴⁹

In accepting as dogma the theory that *some* statutes of limitation only destroy the remedy, the important question as to why this is so has gone unanswered. This is largely because the theory is itself often justified by pointing to the fact that a suit which has been barred can still be maintained in another forum with a longer statute of limitations. It has never been satisfactorily shown why a suit should be permitted if it cannot be maintained under the law to which the forum looks as a model.¹⁵⁰ A proper inquiry must be directed beyond the right-remedy theory.

A close analysis will indicate that more than one question is involved in such an inquiry. Attention must first be given to whether suit is barred by the statute of the forum or the statute of the locus. If suit is barred at the forum, then it must be barred irrespective of its status at the locus. The statute of limitations represents the forum's strong procedural policy against stale evidence. It is better that the plaintiff should suffer because of his delay than that a suit should be brought in the forum's courts under conditions which its legislature has determined are inimical to a proper trial.¹⁵¹ The forum's strong procedural policy is based upon a desire to prohibit stale evidence rather than upon the statute of repose aspect of time limitations.¹⁵² This has long been recognized. The forum does not violate the full faith and credit clause by refusing to enforce a judgment on the ground that

149. Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 *Yale L.J.* 492, 496 (1919).

150. For the view that the matter is determined solely with reference to the *lex fori*, see Ailes, *Limitation of Actions and the Conflict of Laws*, 31 *Mich. L. Rev.* 474 (1933). The author accepts without question the soundness of the right-remedy distinction.

151. It should be noted that there are exceptions to the statute which will protect a plaintiff with a legitimate reason for delay. The fact that the line must be an arbitrary one is necessary whenever a limitation based on time is involved. For example, a girl is no more or less capable of consenting to intercourse the day before or the day after the line of the age of consent.

152. In *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386 (1868), the United States Supreme Court had occasion to consider the nature of statutes of limitation. Although the Court spoke of them as statutes of repose, the Court indicated that the statutes really rested on a fear of stale evidence and a desire to protect parties from "the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth." *Id.* at 390.

it is barred by the forum's statute of limitations.¹⁵³ The *lex fori* determines all aspects of the statute of limitations question, including what acts are sufficient to toll the statute.¹⁵⁴ Since the forum is interpreting its own statute of limitations, there is no occasion to look to the *lex loci* as a model except to determine the time at which the cause of action arose.¹⁵⁵

The problem arises where the action is barred by the statute of limitations of the locus and suit is sought to be maintained at the forum, which has a longer limitation period. As stated previously, the question cannot occur if the forum has a borrowing statute since the shorter statute of the locus will prevent suit.¹⁵⁶ Borrowing statutes represent a legislative policy against forum shopping. The legislature has decided not to permit the forum's courts to be used to enforce a claim barred under the law which is to serve the forum as a model.

In the absence of a borrowing statute, the traditional view is that the action will be barred only if the locus has decided that its particular statute of limitations destroys the right as well as the remedy. The struggles of the courts to determine whether the locus has destroyed the right are amusing, even if the results are inconsistent and the reasoning at times most specious.

It was early recognized that statutes barring an action to recover property are statutes of prescription which destroy the title of the rightful owner by lapse of time. This is a matter of practical necessity designed primarily to protect titles of subsequent purchasers. So too, a statute of the domicile of a decedent which bars claims against the estate unless presented within a certain time has been held to destroy the right.¹⁵⁷ Again this is a rule of necessity designed to permit the final closing of the estate.¹⁵⁸

Wrongful death statutes of limitation have often been held to de-

153. *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 311 (1839). See also *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), holding it was immaterial that the statute of the locus involved a right "unknown to the common law."

154. See *Waterman v. Powell*, 66 F.2d 80 (5th Cir. 1933) (institution of suit that was subsequently dismissed on procedural grounds); *Knight v. Moline, E.M. & W. Ry.*, 160 Iowa 160, 140 N.W. 839 (1923) (filing of pleadings which were subsequently amended).

155. Of course, the time that the cause of action arose is determined by the *lex loci*. The forum's statute begins to run from that date. See *Hutto v. Benson*, 212 F.2d 349 (6th Cir.), cert. denied, 348 U.S. 831 (1954).

156. See note 146 *supra*.

157. *Harrison v. Stacy*, 6 Rob. 15 (La. 1843).

158. See *Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127 (1901), holding that the time limitation upon enforcement of a judgment imposed by the state of rendition destroyed the judgment upon expiration.

stroy the right,¹⁵⁹ perhaps because they involve "rights unknown to the common law."¹⁶⁰ On the other hand, it has been held that the legislature has not determined that the right should be destroyed where the limitation period is not contained within the wrongful death statute itself.¹⁶¹ In the recent case of *Baldwin v. Brown*,¹⁶² however, a Canadian statute of limitations for personal injuries was held not to destroy the right, even though the limitation was contained in the same statute as that imposing liability. The court emphasized the fact that Ontario had no interest in barring the action because all parties were residents of the forum. This reasoning would be sound except for the court's holding that liability was to be determined with reference to Ontario law, since it was the *locus delicti*. In *Bournias v. Atlantic Maritime Co.*,¹⁶³ the statute of limitations was held not to destroy the right because the statute establishing the claim and the limitation was contained in a general labor code, not limited to claims.

Courts have been equally inconsistent on forums' statutes of limitation for wrongful death actions. In *Lipton v. Lockheed Aircraft Corp.*,¹⁶⁴ the forum's statute was held³ not to apply to a cause of action arising outside the state. The court did not consider whether any procedural policy of the forum was involved. A contrary result was reached in *Rosenzweig v. Heller*,¹⁶⁵ where the court held that its statute of limitations for wrongful death barred actions arising elsewhere because it destroyed the right by lapse of time.¹⁶⁶

Consideration must now be given to the situation where the action

159. See Restatement, Conflict of Laws § 605, comment a (1934).

160. The Supreme Court has held this too tenuous a distinction to form the basis for a decision under the full faith and credit clause. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). See note 153 supra.

161. *In re Estate of Daniel*, 208 Minn. 420, 294 N.W. 465 (1940).

162. 202 F. Supp. 49 (E.D. Mich. 1962).

163. 220 F.2d 152 (2d Cir. 1955).

164. 204 Misc. 693, 125 N.Y.S.2d 58 (Sup. Ct. 1953), *aff'd mem.*, 283 App. Div. 769, 128 N.Y.S.2d 550 (1st Dep't), *aff'd mem.*, 307 N.Y. 775, 121 N.E.2d 615 (1954).

165. 302 Pa. 279, 153 Atl. 346 (1931).

166. This is the same statute which was before the Supreme Court in *Wells v. Simonds Abrasive Co.*, 345 U.S. 513 (1953). See notes 153 and 160 supra. Even where the statute of the locus admittedly destroys the right, some courts have been reluctant to give up the right-remedy distinction and have held that the right is destroyed only if the plaintiff is a resident at the locus during the limitation period. *Canadian Pac. Ry. v. Johnston*, 61 Fed. 738 (2d Cir. 1894). Other courts have realized that residence is an immaterial factor; if the right is extinguished, then the residency of the plaintiff should have no effect. E.g., *Bulger v. Roche*, 28 Mass. (11 Pick.) 35 (1831). See Ailes, *Limitation of Actions and the Conflict of Laws*, 31 Mich. L. Rev. 474, 494 (1933), in which the author says that the Johnston case was based on the obsolete concept of choses in action following the person. This problem serves to emphasize the reluctance to abandon the right-remedy distinction.

is barred at the locus but not at the forum and where the statute of the locus does not destroy the "right." A holding that the action is not barred can only be based upon an acceptance of the right-remedy distinction. For *Erie* purposes the matter is clearly determined by state law. In *Guaranty Trust Co. v. York*,¹⁶⁷ the action was barred by a state statute of limitations applicable to equitable actions. There was no corresponding federal statute of limitations for equitable actions, so under federal law the plaintiff could only be barred by laches. The United States Supreme Court expressly applied the outcome test. The applicability of the statute of limitations obviously affected the outcome, since it determined whether suit could be maintained. In deciding that the matter was to be determined by state law, the Court observed: "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."¹⁶⁸

Use of the right-remedy distinction to permit suit serves no useful purpose. Moreover, it encourages forum shopping of the worst sort, since suit is brought at the forum because it is barred in the very state which is considered by the forum to be so involved with the claim that its law must be used as a model to determine liability. Therefore, the forum should not base its decision upon the right-remedy doctrine. The shorter statute of limitations of the locus should be applied simply because the matter materially affects the outcome of the case. No procedural policy of the forum is violated if the suit is refused. The absence of a borrowing statute should not prevent application of the statute of the locus; for a policy against forum shopping can be set out by the judiciary as well as by the legislature.¹⁶⁹

The outcome test should also be applicable to the doctrine of laches when equitable relief is sought.¹⁷⁰ Under the *Erie* line of cases,

167. 326 U.S. 99 (1945).

168. *Id.* at 110. The reasoning is, of course, inapplicable to the forum's own statute of limitations, as indicated by the preceding discussion.

169. The proposed use of the outcome test, which was suggested in Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 Yale L.J. 492 (1919), may be thought of as an application of the principle of forum non conveniens. The forum would not be acting as a forum of convenience if the result in the case were different from that which would be reached at the locus. However, in *Running v. Southwest Freight Lines, Inc.*, 227 Ark. 839, 303 S.W.2d 578 (1957), the court reversed a lower court's refusal to entertain a suit on the ground of forum non conveniens and observed that it was not proper to consider the fact that the statute of limitations had run at the locus.

170. Laches consists of an unreasonable delay in prosecuting a suit which results in prejudice to the defendant because of lapse of time. Both unreasonable delay and prejudice must be present. See *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945).

the question is held to be determined by state law because of the effect upon the outcome. Whether the plaintiff has been guilty of laches determines the availability of specific relief. As to that relief laches operates in the same way as a statute of limitations.¹⁷¹ If recovery would be barred by laches at the forum, then it should be denied. The forum must decide whether it will give the remedy of specific relief, and it must not do so if it considers the remedy improper because of the lapse of time and the resulting prejudice. Specific relief should also be denied at the forum if it would be denied at the locus. Even though the locus would permit the action, relief should still be denied, since the forum's procedural policy is in no way affected by refusing to entertain a suit.

The Statute of Frauds

The question of the statute of frauds in the conflict of laws is most intriguing. It may arise in the following situations: (1) Where the transaction satisfies the statute of frauds of the locus but not that of the forum. In such a case the question is whether the forum's statute will be characterized as "procedural." If so, it applies to all suits brought in the forum irrespective of the law of the state to which the forum looks to find a model to use in determining substantive liability. (2) Where the transaction satisfies the statute of the forum, but not that of the locus. The question presented in this situation is whether the statute of the locus will be characterized as "substantive," thus barring the suit. (3) Where the transaction satisfies the statute of frauds of *neither* the forum nor the locus. Logically, neither statute should be a bar if the statute of the forum is characterized as "substantive" and that of the locus as "procedural."

A number of solutions traditionally have been employed or suggested. One is to treat the question as one of "procedure" in all cases with validity *vel non* determined solely with reference to the *lex fori*. Thus, in *Fimian v. Guy F. Atkinson Co.*,¹⁷² it was stated that the statute of frauds relates to the "remedy" and is to be determined without reference to the *lex loci*. Another approach is to treat the question as one of "substance," with validity *vel non*¹⁷³ determined solely by the *lex loci*.

171. See *Bechler v. Kaye*, 222 F.2d 216 (10th Cir. 1955), cert. denied, 350 U.S. 837 (1955); *Lassiter v. Powell*, 164 F.2d 186 (4th Cir. 1947), cert. denied, 333 U.S. 845 (1948).

172. 209 Ga. 113, 70 S.E.2d 762 (1952).

173. This approach has been followed both in cases where there was no compliance with the statute of frauds under the *lex loci*, *Castorri v. Milbrand*, 118 So. 2d 563 (Fla. Dist. Ct. App. 1960), and where there was such compliance, *Lams v. F. H. Smith Co.*, 36 Del. (6 W.W. Harr.) 477, 178 Atl. 651 (Super. Ct. 1935); *Jackson v. Jackson*, 122

Finally, it has been suggested that the statute of frauds may be both "substantive" and "procedural." This theory requires that there be compliance with both the statute of the forum and that of the locus.

Another approach is the rule adopted in *Leroux v. Brown*,¹⁷⁴ which made the result depend upon the wording of the statute. The fourth section of the English statute of frauds contained the words, "no contract shall be allowed to be good." This section was held to be procedural because of its wording, and thus was simply a bar to actions based upon contracts which did not comply with it. The seventeenth section, on the other hand, was held to be substantive. Instead of just barring suits it rendered void all noncomplying contracts. Thus, courts viewing their statutes as substantive will not apply them to contract actions based upon agreements made in other jurisdictions, while courts following the procedural interpretation will do so. Moreover, courts following the word test approach apply the test to the statutes of both the forum and the locus, unless there has been a contrary decision by the courts of the locus. Thus, if the statute of the forum reads "the contract is void" and that of the locus reads "no action shall be brought," the result can be enforcement of a contract which satisfies neither provision.¹⁷⁵

An interesting case refusing to approach the statute of frauds question as one of substance or procedure¹⁷⁶ is *Alaska Airlines, Inc. v. Stephenson*.¹⁷⁷ Suit was brought in Alaska on an oral contract of employment which had been made in New York. Performance of the contract was to be almost entirely in Alaska. The court held that Alaska's statute of limitations was applicable, but said that it would have applied the New York statute if the courts of that state had clearly declared it to be substantive. Noting that the New York statute

Utah 507, 252 P.2d 214 (1953); *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N.W. 372 (1914).

174. 12 C.B. 801, 138 Eng. Rep. 1119 (C.P. 1852).

175. See *Marie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883). The case is an excellent example of mechanical jurisprudence—logic is followed without questioning the soundness of the premise or the ultimate result.

176. The "substance and procedure" distinction has been disregarded in some cases. One court has taken the position that the enforcement of a statute not complying with its statute of frauds would be against public policy. *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879 (1917). Contracts to make a will have been dealt with in a particular fashion. Courts have indicated that because such agreements involve the final disposition of a party's estate, their validity should not depend upon the choice of forum. Thus, the result has been held to be determined either by the lex domicilii at death, *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895); *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953), or by the law of the decedent's domicile at the time and place of the making of the testamentary contract, *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906 (1961).

177. 217 F.2d 295 (9th Cir. 1954).

had been held to be "primarily procedural and perhaps substantive, too,"¹⁷⁸ and that New York seemed "to rely on the center of gravity theory of the contract,"¹⁷⁹ the court in *Alaska Airlines* relied on the fact that Alaskan law would have been applied had suit been brought in New York. The court's reasoning is confusing. It is clear that the court did not hold merely that the question was determined by the *lex fori*. This may have been a renvoi case in which the court looked to New York and then applied New York's conflicts rules to look to Alaska. A simpler method would have been to characterize Alaska as the locus because the contract was to be performed there and to determine the question with reference to the *lex loci*.

Commentators have advanced various views as to the solution of the statute of frauds problem. Professor Ehrenzweig has suggested that, realistically speaking, most courts will enforce a contract if it satisfies either the statute of the locus or that of the forum.¹⁸⁰ The only condition which Ehrenzweig places upon this approach is that the forum have sufficient contacts to constitutionally apply its statute, thus avoiding forum shopping where the court acts as a forum of convenience. Professor Lorenzen has reached substantially the same result.¹⁸¹ He advocates that the matter be determined with reference to the *lex loci* except in international transactions where the contract should be upheld if it satisfies the *lex fori*.¹⁸²

These conflicting approaches and suggestions can be profitably discussed only when one realizes that there are two statutes involved, rather than one. It is important to look first at the situation where there is no compliance with the forum's statute. Often courts treat the question as one of statutory construction. The Restatement has followed this approach.¹⁸³ This is particularly true when the court is committed to a *Leroux v. Brown* approach.¹⁸⁴ First the question is

178. *Id.* at 297-98.

179. *Id.* at 298. See *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), where the parties were domiciled in England. The wife continued to live there, but the husband deserted her and she finally caught up with him in New York, where they executed a support agreement. It was held that all matters were governed with reference to English law.

180. Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 Colum. L. Rev. 874 (1959).

181. Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 Yale L.J. 311, 338 (1923).

182. The reason for the international transaction exception is that the statute of frauds is an impediment to such transactions, since it is impossible for the parties to predict in advance where the suit will be brought, or which law will be held to govern. Lorenzen does not require that the forum have any contact with the transaction in such a case. *Id.* at 333.

183. Restatement, *Conflict of Laws* §§ 598, comment a, 602, comment a (1934).

184. See note 174 *supra* and accompanying text.

asked whether the legislature of the forum intended to bar suits on all transactions not in compliance with the forum's statute of frauds. The *Leroux v. Brown* courts indicate a method by which such intent can be ascertained. However, it must be asked whether the legislature was thinking in terms of the conflict of laws when it enacted the statute. It should be noted that after the decision in *Leroux v. Brown*, the seventeenth section of the statute was amended to read "not enforceable."¹⁸⁵ This demonstrated that the legislative intent was to bar enforcement of all contracts not in compliance with the forum's statute. But, is there ordinarily such evidence of legislative intent?

It would seem that the concern of the legislature in enacting the statute of frauds is primarily to protect parties who are dealing in that state rather than to establish a procedural rule to be followed in the courts of the forum.¹⁸⁶ A state encouraging commercial intercourse may have a lenient statute, or none at all. A state desiring to protect its residents against certain transactions will require greater formality. The legislature is concerned with protecting and affecting the interests of the parties who transact business within the state rather than with establishing procedural policy to be followed when the courts act as a forum of convenience.¹⁸⁷

It is well established that the requirement of the statute of frauds is not a rule of evidence. A case can often satisfy the statute by means other than a writing. The fact that a memorandum made after suit has been commenced ordinarily does not satisfy the statute indicates that it is not an evidentiary rule.¹⁸⁸ Much like the parol evidence rule, the statute of frauds represents a policy requiring written proof of the validity of commercial transactions. It is well settled that the application of the parol evidence rule is determined solely with reference to the *lex loci*.¹⁸⁹ In view of these considerations it is submitted that the statute of frauds should not be deemed to represent a procedural policy of the forum absent specific language to that effect. Rather, it should be deemed to establish a policy designed to insure that contracts governed by the law of the forum should be given effect only upon compliance with certain conditions.

Once it is decided that the forum's statute is not applicable to

185. Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 *Yale L.J.* 311, 313 (1923).

186. See discussion of this point in *Lams v. F. H. Smith Co.*, 36 Del. (6 W.W. Harr.) 477, 482, 178 Atl. 651, 654 (Super. Ct. 1935).

187. See Stumberg, *Conflict of Laws* 149 (2d ed. 1951).

188. See Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 *Yale L.J.* 311, 324-28 (1923).

189. *Kirtley v. Abrams*, 299 F.2d 341 (2d Cir. 1962) (applying New York law); *Baxter Nat'l Bank v. Talbot*, 154 Mass. 213, 28 N.E. 163 (1891).

transactions whose validity is determined with reference to the law of another state, the interpretation which has been given the statute of the locus is of no concern to the forum. It must be remembered that the forum is applying its own law. Because it is a forum of convenience, the court of the forum should attempt to insure the same result which would be reached at the locus. The statute of frauds materially affects the outcome of a case, for it determines whether suit can be maintained on the contract at all. It has never been disputed that the statute of frauds question is to be determined by state law for *Erie* purposes.¹⁹⁰ No procedural policy of the forum is involved. As indicated, the statute does not set forth a rule of evidence. Moreover, the theory of the statute is not that it is unfair to enforce an oral contract, but that oral contracts in certain cases should not be sufficient to create contractual interests unless the parties show they are sufficiently serious to make a memorandum or do other acts. Therefore, where the contract satisfies the statute of the locus, there is no reason why it should not be enforced in the forum, and vice versa.

The view that a contract which complies with the *lex fori*, but not the *lex loci*, should be enforced if there are sufficient contacts¹⁹¹ or if the contract involves an international transaction,¹⁹² represents a distaste for the statute of frauds. Proponents of this view would seize upon the validity of the transaction at the forum to avoid the bar at the locus. Distaste for the statute of frauds is not a relevant factor once the forum has decided that the result should be the same as if suit had been brought at the locus. This is true whether the transaction is valid or void under the statute of the locus. When it incorporates the law of another state, the forum decides that it has no interest in the soundness of the law which it incorporates. For this reason, all questions as to the statute of frauds should be determined with reference to the *lex loci*.

Burden of Proof

At the outset, a distinction must be drawn between the two aspects of the burden of proof. On the one hand is the risk of nonproduction. This is a shifting burden requiring that a party produce some evidence or suffer a nonsuit. When a party has done so, the burden shifts to the other party to produce evidence sufficient to take the case to the jury. When both parties have produced such evidence, the risk of nonproduction comes to an end. The other aspect is the risk of non-

190. The point was discussed briefly in *Macias v. Klein*, 203 F.2d 205 (3d Cir.), cert. denied, 346 U.S. 827 (1953). The court observed how it would "significantly affect the result of the litigation." 203 F.2d at 207.

191. See note 180 *supra* and accompanying text.

192. See note 182 *supra* and accompanying text.

persuasion. This remains constant and is relevant when the case reaches the trier of fact. If the mind of the trier of fact remains in equilibrium, he is to decide against the party having the risk of non-persuasion.¹⁹³

Since the question of who has the risk of nonproduction will not materially affect the outcome if the evidence is readily available, the *lex fori* should govern. As Professor Stumberg has pointed out, this burden merely "affects the order in which the plaintiff or defendant presents his side of the case."¹⁹⁴ Where it is likely that proof will be unavailable, though, there will generally be a presumption or an inference. These problems are taken up individually.¹⁹⁵

As to the risk of nonpersuasion, which may now be called the burden of proof, the traditional view is that it is determined by the *lex fori* unless it has been interpreted by the locus as a "condition of the cause of action."¹⁹⁶ The problem which thus arises is similar to that encountered with regard to the "substantive statute of limitations." Did the locus entwine the cause of action with the burden of proof? The issue has arisen most frequently in cases involving the burden of proof as to contributory negligence. This burden is ordinarily on the defendant, since he is alleging the existence of contributory negligence; but some states have held that the plaintiff has the burden of showing that he is free from fault. In *Reddick v. M. B. Thomas Auto Sales*,¹⁹⁷ the court overruled prior cases and held that it would apply the rule of the locus which placed the burden of proof upon the plaintiff, rather than the traditional burden of proof rule of the forum. The court said that meeting the burden was a condition to the plaintiff's cause of action and thus was no different from the requirement that he show the defendant to have been negligent, a requirement which is clearly determined with reference to the *lex loci*.¹⁹⁸ In *Pre-court v. Driscoll*,¹⁹⁹ the court reached the same result but based its decision upon a different theory, observing that it was necessary to bring over the remedy of the locus in order to "preserve the integrity and character" of the cause of action.²⁰⁰ Also important to that de-

193. See Stumberg, *supra* note 187, at 156, and Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 180 (1944), for discussions of this distinction.

194. Stumberg, *supra* note 187, at 156.

195. See text accompanying notes 213-41 *infra*.

196. Restatement, *Conflict of Laws* § 595, comment a (1934).

197. 364 Mo. 1174, 273 S.W.2d 228 (1954).

198. See *Spencer v. Bright*, 159 F. Supp. 16 (E.D. Ky. 1958) (applying Kentucky law).

199. 85 N.H. 280, 157 Atl. 525 (1931).

200. *Id.* at 283, 157 Atl. at 527.

cision was a finding that no policy of the forum would be adversely affected.²⁰¹

Other courts have held that questions of burden of proof are determined solely with reference to the *lex fori* whether or not the burden of proof is "inseparably bound" to the cause of action.²⁰² However, a court following this approach did hold that the burden was to be determined with reference to the *lex loci* in a case where the statute of the locus established a rule of comparative negligence.²⁰³ The rationale for the decision was that comparative negligence involves a right unknown to the common law.²⁰⁴ In *State Mut. Life Assur. Co. v. Wittenberg*,²⁰⁵ the court held that the burden of proof on the issue of whether a worker was regularly employed within the meaning of a group life insurance policy was not "inseparably woven into the cause of action so that to divorce the remedy from the right would defeat the cause of action,"²⁰⁶ and applied the forum's burden of proof.

The position that the law of the locus will apply only if the burden of proof is "inseparably bound up" with the cause of action has been criticized primarily on the ground that it does not supply a test which can be employed with any degree of precision. The Restatement expounds the position, but supplies no criteria for determining whether the matters are inseparably connected.²⁰⁷ Judge Magruder, in commenting on section 595 of the Restatement, has observed:

But to say it is a condition of the cause of action seems to be merely another way of saying that the plaintiff has the burden of proof; for if this burden is upon the plaintiff, his recovery is necessarily conditioned upon his convincing the jury of his freedom from contributory fault. . . . A similar verbal twist could be used to show that a rule putting the burden on the defendant is a matter of substance. It can be said that where a defendant has negligently caused harm, the requirement that he must affirmatively establish the plaintiff's contributory negligence is a "condition" of his defense. But putting it this way really proves nothing.²⁰⁸

201. Id. at 282, 157 Atl. at 526.

202. *Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919); *Wright v. Palmison*, 237 App. Div. 22, 260 N.Y. Supp. 812 (2d Dep't 1932).

203. *Fitzpatrick v. International Ry.*, 252 N.Y. 127, 169 N.E. 112 (1929).

204. This approach is much the same as that taken in cases involving the statute of limitations on wrongful death actions. See notes 159-65 *supra* and accompanying text.

205. 239 F.2d 87 (8th Cir. 1956) (applying Arkansas law).

206. Id. at 90.

207. See Restatement, Conflict of Laws § 595, comment a (1934).

208. *Sampson v. Channell*, 110 F.2d 754, 755 n.2 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

It appears to the writer that a court means only that allocation of the burden of proof is more likely to affect the outcome of the case when it concludes that the burden of proof is a "condition to the cause of action." Because of the effect upon the outcome, the court will say that the issue is determined with reference to the *lex loci*, or, in traditional terms, that it is "substantive." Since the question of liability is likely to be a close one in cases of negligence and contributory negligence the court is apt to recognize that the burden of proof makes a real difference. However, in every case there is the possibility that the trier of fact will reach a state of equilibrium. The burden of proof materially affects the outcome, since it determines who prevails when such a deadlock occurs. With this in mind, it may be seen that whether the burden of proof is a "part of the cause of action" or is applicable to a "right unknown to the common law" is irrelevant.

It has been recognized that the burden of proof is determined by state law for *Erie* purposes. In *Cities Service Oil Co. v. Dunlap*,²⁰⁹ the Court held that the burden of proof on the issue of bona fide purchaser for value represented a "substantial right upon which the holder of recorded legal title to . . . land may confidently rely." In *Palmer v. Hoffman*,²¹⁰ the Court held that the burden of proof as to contributory negligence was determined by state law. After the enunciation of the outcome test in *Guaranty Trust Co. v. York*,²¹¹ there is no doubt that the burden of proof as to all aspects is determined by state law. This is equally applicable to the degree of proof, for example, where there is substantial evidence to prove a contract in an action for specific performance.²¹²

The outcome is affected to the same extent in the conflicts situation. Again, the forum is not concerned with whether the locus characterizes the question of burden of proof as one of "substance" or "procedure." The forum is applying its own law and will use that of the locus as a model when it materially affects the outcome. There is also no procedural policy of the forum that is adversely affected if the locus' burden of proof rule is used as a model. There is nothing fundamentally unfair about allocating the risk of nonpersuasion to one party or the other. Because of its material effect upon the outcome when the mind of the trier of fact is in equilibrium the question of the burden of proof should be determined in all cases with respect to the *lex loci*.

209. 308 U.S. 208 (1939).

210. 318 U.S. 109 (1943).

211. See notes 25-26 *supra* and accompanying text.

212. *Johnson v. Mosley*, 179 F.2d 573 (8th Cir. 1950).

Presumptions

A true presumption is a rule that when certain facts have been proven, other facts are presumed to exist unless rebutted by the party against whom the presumption runs.²¹³ It should be noted that a presumption shifts the risk of nonproduction to the party against whom the presumption runs. It is likely that he will also bear the risk of non-persuasion if the trier of fact cannot decide if the evidence introduced is sufficient to rebut the presumption.

The problem encountered in determining whether the forum should apply its own presumptions in a conflicts case or bring over the presumptions of the locus is complicated by the fact that presumptions are of different weights and have different purposes. Some, like the presumption of innocence in a civil action, merely require a party to come forward with evidence. Other presumptions, like the reply doctrine, relate purely to questions of evidence. A presumption may represent a strong social policy of the forum, as is the case with the presumption of legitimacy. Others may represent an attempt to permit a party to get to the jury where the evidence to support his claim is not of a type which is likely to be available to him.

Some presumptions have a rational basis. The presumption against suicide is based on our experience that the great mass of persons who die, even of nonnatural causes, do not take their own lives. On the other hand, the presumption that an employer is guilty of negligence and his employee free from fault if an accident occurs during the course of employment is not necessarily in accord with human experience.²¹⁴

Analytically, presumptions relate to evidence, because they permit a party to go to the jury even when he cannot produce evidence of a necessary fact. Therefore, the conventional approach is that questions of presumption are to be determined exclusively by the *lex fori*.²¹⁵ This approach is sound only where the presumption operates merely

213. "Conclusive presumption" is a misnomer. Since such a presumption cannot be rebutted, it is no different from any other rule of law. A presumption is distinguishable from an inference because the trier must presume Fact *B* when Fact *A* has been proved. In the case of an inference the trier may presume Fact *B*, but is not required to do so. See Cook, *The Logical and Legal Bases of the Conflict of Laws* 177-79 (1942), for a discussion of the operation of presumptions. This distinction is not important for our purposes, and both inferences and presumptions will be treated under the generic term, "presumptions."

214. Rather than solve the problem in this manner, states have adopted workmen's compensation statutes.

215. See, e.g., *Sloniger v. Enterline*, 400 Pa. 457, 162 A.2d 397 (1960), where the court observed that the only presumptions applicable were those of the forum. Section 595(2) of the Restatement adopts this approach.

to shift the burden of producing evidence. In *Broderick v. McGuire*²¹⁶ a statute of the locus made a certificate of the superintendent of banks as to his determination of a bank's insolvency presumptive evidence of the facts stated in the certificate. The presumption was held to be inapplicable in an action in another state to enforce a statutory assessment against the stockholders. The court said that the presumption was not "so much of the substance of the right that . . . [it] should be given effect" extraterritorially.²¹⁷ Since the records of the bank's assets and liabilities could be subpoenaed, the refusal to apply the presumption did not materially affect the outcome. It is no different from any other risk of nonproduction situation where the evidence is obtainable.²¹⁸

At the other end of the spectrum are certain matters clearly accepted as rules of substantive law for all purposes which take the form of presumptions. For example, the resulting trust is really a presumption: If land is conveyed to *A*, but the purchase is paid by *B*, who has no close relationship to *A*, we say that *A* holds in trust for *B* unless *A* rebuts the presumption of a trust and shows that *B* actually intended the land to be held by *A* as a gift.²¹⁹ In terms of technique a resulting trust is no different from any other presumption, as the presumed fact can be rebutted by a showing of other facts.

The traditional approach is unsatisfactory because it fails to recognize that a presumption often is intended to achieve a favorable result for one party or at least enable him to get to the jury, except in those rare cases where the other party can show that he should not be liable in a particular situation. For *Erie* purposes the effect of a presumption on the outcome has been clearly recognized. Thus, in *Dick v. New York Life Ins. Co.*,²²⁰ it was assumed by both parties that the presumption against suicide was substantive for *Erie* purposes. The court also observed that presumptions, like the burden of proof, have a material effect on the outcome.²²¹ The effect of presumptions on the outcome has been recognized in a number of other cases involving the doctrine of *res ipsa loquitur*.²²²

There is no doubt that a rule of the locus imposing absolute

216. 119 Conn. 83, 174 Atl. 314 (1934).

217. *Id.* at 102, 174 Atl. at 322.

218. See Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 192-93 (1944).

219. See Cook, The Logical and Legal Bases of the Conflict of Laws 179 (1942).

220. 359 U.S. 437 (1959).

221. The same approach was recognized earlier in *Pilot Life Ins. Co. v. Boone*, 236 F.2d 457 (5th Cir. 1956).

222. *Hamilton v. Southern Ry.*, 162 F.2d 884 (4th Cir. 1947); *Sierocinski v. E. I. Du Pont de Nemours & Co.*, 118 F.2d 531 (3d Cir. 1941).

liability would be taken as a model, absent a public policy objection. The result should be no different where the locus uses the device of a presumption which has the effect of imposing absolute liability in the great majority of cases, while allowing the defendant to show in certain cases that he really should not be liable. This type of presumption was presented to the court in *Buhler v. Maddison*.²²³ A statute of the *lex loci delicti* provided that there should be a presumption that any injury to an employee was proximately caused by the negligence of the employer if he had not accepted coverage under the state workmen's compensation act. In a personal injury action the forum applied the statutory presumption on the theory that the presumption was an integral part of the cause of action. The court's holding, if not its reasoning, is entirely correct. The statute was clearly an attempt to place employees of a rejecting employer on a par with those of an accepting one. The decision whether to give effect to the presumption clearly had a material effect upon the outcome, since the injured employee would be unlikely to possess evidence of negligence in many cases.

Many presumptions fall into this category. Where the presumption has been set forth in a statute, there is no difficulty in determining its effect.²²⁴ In passing the statute involved in *Buhler*, the legislature stopped short of imposing absolute liability. However, it imposed upon the defendant the duty of showing a clear absence of liability in cases where all the evidence was likely to be in his hands, or where no evidence existed at all. The difference in effect between this statute and one which imposes absolute liability is very slight. Yet there are cases like *Southern Ry. v. Robertson*,²²⁵ in which the court held that a rebuttable presumption of negligence running in favor of a railroad employee injured in the course of his employment should be determined by the *lex fori* because the presumption was not an integral part of the cause of action.²²⁶

A more realistic approach was taken by the Missouri court in *Hiatt v. St. Louis-S.F.R.R.*²²⁷ The case involved a statute of the locus which, on its face, imposed absolute liability upon a showing that a person had been injured by a moving train. The statute had been interpreted merely to create a presumption of negligence. The forum

223. 109 Utah 267, 176 P.2d 118 (1947).

224. See the objections to applying presumptions of the locus because of the difficulty of ascertainment of the effect of common law presumptions in Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 192-93 (1944).

225. 7 Ga. App. 154, 66 S.E. 535 (1909).

226. Accord, *St. Louis & S.F.R.R. v. Coy*, 113 Ark. 265, 168 S.W. 1106 (1914).

227. 308 Mo. 77, 271 S.W. 806 (1925).

applied the statutory presumption, holding that it created a "substantial substantive right." The Missouri court, in effect, recognized that such presumptions are substitutes for absolute liability and are clearly designed to put the plaintiff in a better position than he would be absent the presumption. To that extent they materially affect the outcome.

The same reasoning is applicable where violation of a statute creates a presumption of negligence, or, to use the more common description, is *prima facie* evidence of negligence. There can be no doubt that a provision of the *lex loci* to the effect that violation of a statute constitutes negligence *per se* would be considered "substantive." The result should be no different because the defendant is given the opportunity to show that he actually was not negligent despite the violation. However, this approach was rejected in *Hamlet v. Hook*,²²⁸ where it was held that a statute of the locus providing that a speeding violation constituted *prima facie* evidence of negligence was "procedural" for conflicts purposes. The same result was reached in *Sylvania Elec. Prods., Inc. v. Barker*.²²⁹ A statute of the forum provided that a showing of the manufacture of a dangerous product and the absence of warning would give rise to a presumption that the manufacturer knew of the danger. The statute was held to be procedural. Both cases relied on section 595 of the Restatement. Both cases also ignored the fact that such statutes really impose absolute liability except in the rare situation where the defendant can establish that he was not negligent. In any event, the statutes at least give the plaintiff a chance to get to the jury without producing any other evidence.²³⁰

Presumptions such as these are not necessarily based upon human experience. They represent attempts to benefit a party who cannot produce evidence to support his contention. For example, upon the death of one party to a transaction the other may not be allowed to prove the transaction. If the locus provides that contributory negligence shall not be a defense in a wrongful death action, the forum should incorporate the *lex loci*. The result should be no different where

228. 106 Cal. App. 2d 791, 236 P.2d 196 (Dist. Ct. App. 1951).

229. 228 F.2d 842 (1st Cir. 1955), cert. denied, 350 U.S. 988 (1956) (applying Massachusetts law).

230. See *Shepard & Gluck v. Thomas*, 147 Tenn. 338, 246 S.W. 836 (1922), where the court refused to draw the presumption of the locus that certain actions were indicative of a contract for the sale of futures which were illegal under the *lex loci*. The matter was asserted as a defense to the contract. These presumptions were completely out of accord with any experience and seemed more like an effort to discourage certain practices. Nonetheless, the effect would have been to bar recovery at the locus, and the presumptions should have been incorporated by the forum.

a statute creates a presumption of due care on the part of the decedent. Yet in *Richardson v. Pacific Power & Light Co.*,²³¹ such a presumption of due care was held to be "procedural," and the forum's statute was applied.

The presumption against suicide, which may have a logical base, also materially affects the outcome. For example, where a person dies of nonnatural causes, the presumption helps the beneficiary of a life insurance policy recover even though he cannot prove that death was not due to suicide. The actual evidence as to the cause of death will be most difficult to obtain, and the presence or absence of a presumption against suicide will determine whether the locus is attempting to protect the beneficiary or the insurer. In *Pilot Life Ins. Co. v. Boone*,²³² this attempt to protect the beneficiary was recognized as a matter materially affecting the outcome which was to be determined with reference to the *lex loci*.²³³ The court emphasized the relationship of this presumption to the right to defend under the policy.

The same reasoning applies with respect to the presumption of payment²³⁴ and the presumption of assent to limitation on liability by acceptance of a bill of lading containing such limitations.²³⁵ In such cases evidence will probably be sharply conflicting. It may be unavailable. Such a presumption can tip the scales in favor of the party for whose benefit the presumption applies and should be determined by the *lex loci*.²³⁶

Res ipsa loquitur has undergone a transformation which should affect its characterization for conflicts purposes. I must disagree with Professor Morgan that it operates merely to make the issue of negligence a question for the jury.²³⁷ Even if that were all it did, it still

231. 11 Wash. 2d 288, 118 P.2d 985 (1941).

232. 236 F.2d 457 (5th Cir. 1956) (applying South Carolina law).

233. In the forum the presumption shifted the burden of persuasion; in the locus it shifted that of production. This is immaterial due to the difficulty of proof.

234. Held to be controlled by the *lex loci* in *Thomson-Houston Elec. Co. v. Palmer*, 52 Minn. 174, 53 N.W. 1137 (1893).

235. Held to be controlled by the locus in *Hartman v. Louisville & N.R.R.*, 39 Mo. App. 88 (1890). There the forum refused to apply this presumption, and none existed under the *lex loci*. In *Hoadley v. Northern Transp. Co.*, 115 Mass. 304 (1874), the forum did apply such a presumption, saying it involved only a difference in the mode of proof.

236. As the court observed in *Hartman v. Louisville & N.R.R.*, supra note 235, at 100-01:

The rule [governed by the *lex loci*] must of necessity apply to such a contract as the one before us; otherwise we should be involved in the solecism of holding that a piece of paper containing a stipulation, of no validity in the place where it was executed and delivered and where the general engagement evidenced by it was to be chiefly performed, becomes a contract in some other jurisdiction in which an action may chance to be brought upon it.

237. See Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 177-78 (1944).

could be contended that this materially affects the outcome. *Res ipsa loquitur* is used as a device to impose absolute liability in cases where the facts cannot be determined. The best example is the applicability of the doctrine in airplane crashes. It imposes absolute liability except in those unlikely cases where the defendant can come forward with evidence showing that he is not at fault. Its relationship to the imposition of absolute liability is clear, and it has been held to be determined by state law for *Erie* purposes.²³⁸ However, many courts still say that since *res ipsa loquitur* creates only a presumption and not absolute liability, the question should be determined by the *lex fori*.²³⁹ These cases represent examples of "mechanical jurisprudence." The court analyzes the problem in conceptual terms and makes its decision on that basis without considering the practical effects.

However, in *Lachman v. Pennsylvania Greyhound Lines, Inc.*,²⁴⁰ the court did look to the effect of this presumption and concluded that the question should be determined with reference to the *lex loci*. The court treated the analysis for *Erie* purposes and conflicts purposes as co-extensive and said that whether proof of the occurrence of the injury alone will or will not justify a finding of liability on the ground of negligence materially affects the outcome.²⁴¹ This reasoning is sound in light of the obvious effect of *res ipsa loquitur*.

Even though presumptions clearly affect the outcome unless they involve the production of evidence readily obtainable, it is necessary to consider the procedural policy of the forum. Employing the presumption of the locus or failing to employ the forum's presumption cannot interfere with the efficient operation of the forum's judicial system, but may involve procedural policy. It may be contended that the existence of a presumption in the forum indicates its view that fairness demands that certain types of proof which are difficult to obtain should be presumed. The answer to this contention is that such a policy is properly implemented by allocation of the burden of production. A presumption should not be used to enable a party to prevail without introducing any evidence. To permit such recovery would not involve procedural policy, since it is not necessary in order to be "fair" to that

238. *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958); *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951), cert. denied, 342 U.S. 945 (1952).

239. See *Estep v. Norfolk & W. Ry.*, 192 F.2d 889 (6th Cir. 1951) (applying Kentucky law); *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1959) (applying New York law); *Dodson v. Maddox*, 359 Mo. 742, 223 S.W.2d 434 (1949); *Clodfelter v. Wells*, 212 N.C. 823, 195 S.E. 11 (1938) (dictum).

240. 160 F.2d 496 (4th Cir. 1947) (applying Virginia law).

241. See also *Matsumoto v. Chicago & N.W. Ry.*, 168 F.2d 496 (7th Cir.), cert. denied, 335 U.S. 826 (1948) (applying Wisconsin law), where the court held without discussion that all questions relating to *res ipsa loquitur* were determined by the *lex loci*.

party. Rather it represents a determination that he should recover absent proof to the contrary. This type of determination should be made with reference to the law of the state which governs as to the issue of liability. It is not the forum's province to see to it that a particular party prevails. Since the forum does not hesitate to enforce absolute liability in most instances, it should not hesitate to permit enforcement of less than absolute liability in the form of presumptions which favor one party. Giving effect to a presumption does not affect the fairness of a trial to the extent that the forum should refuse to incorporate a matter which materially affects the outcome.

In this area, the result should be the same as in the *Eric* line of cases. All presumptions except those relating to the production of evidence which is readily available materially affect the outcome and should be determined with reference to the *lex loci*.

Evidence

The traditional rule is that matters relating to evidence are determined by the *lex fori*.²⁴² If evidentiary questions are defined as those involving admissibility, competency, and relevancy, and presumptions and the burden of proof (risk of nonpersuasion) are eliminated from its scope, then this rule is sound. Whether a particular piece of evidence is admitted or not may have no real effect upon the outcome of the case. Because there is no way of knowing what the jury takes into account in reaching its decision it is regarded as error to exclude admissible evidence or to admit that which is inadmissible. Even so, all questions of evidence may not materially affect the outcome. Thus, a reversal is granted only where the erroneous decision as to the evidence is "prejudicial."

The traditional rule is also sound from a practical point of view. It is a practical impossibility for the forum to incorporate the entire body of evidence law of the locus. A judge trying a case must make evidentiary decisions fairly rapidly if the trial is to proceed with any dispatch. He cannot adapt to an entirely new system whenever a case involves a foreign element, discarding responses which may in some cases be almost automatic.

Finally, matters of evidence reflect a strong procedural policy of the forum with respect to how a case should be tried. The forum has its own views as to what evidence is trustworthy, what persons can be relied upon to tell the truth, what will improperly influence juries, and how much control the judge should be permitted to exercise.

These three reasons combine to make a strong argument that

242. Restatement, Conflict of Laws §§ 595-98 (1934).

the *lex fori* should control as to matters of evidence. This is illustrated by *Lynde v. Western & So. Life Ins. Co.*,²⁴³ a case involving suit on an insurance policy. The insured died in a state other than the forum, and the beneficiaries claimed that the death had been accidental within the meaning of a double indemnity provision of the policy. The defense was that the insured had committed suicide. The only evidence of accidental death was a death certificate prepared by the coroner. This certificate was admissible at the locus, the state where the insured died and where the policy was issued. The official who had prepared the death certificate was apparently not a physician, and the physician who had conducted the autopsy testified that it was impossible to determine whether or not death had been due to carbon monoxide poisoning. The court correctly held that the admissibility of the certificate was determined by the *lex fori*, and refused to admit it. It is doubtful whether admitting the certificate would have made any real difference in the outcome of the case, in view of the testimony of the physician. Moreover, the layman who had prepared the certificate had no way of knowing whether death had been caused by carbon monoxide poisoning. The certificate merely represented the opinion of one with doubtful qualifications to render such an opinion. The forum could well decide that a death certificate prepared by a layman should not be regarded as trustworthy. Thus, even if this evidence could have influenced the jury, the court was still correct in its holding. The forum is responsible for the trial, knows its juries, and should determine whether they should hear evidence of this sort.

The fact that many evidentiary questions will not materially affect the outcome of a case, the impracticability of a judge's applying another system of evidence law, and the forum's interest in reaching a fair result have all been recognized in the *Erie* situation. The emphasis has rightly been upon the lack of outcome effect rather than upon federal procedural policy. It should be remembered that under Rule 43 evidence which is admissible in state courts is admissible in federal courts. A problem will arise in the *Erie* situation only when the evidence is inadmissible under state law, but admissible under some other provision of Rule 43. Because of the combination of practicality and lack of probable effect upon the outcome, questions such as the scope of cross-examination,²⁴⁴ admissibility of depositions,²⁴⁵ the relative weight of positive, negative, direct and circum-

243. 293 S.W.2d 147 (Mo. Ct. App. 1956).

244. *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950).

245. *Franzen v. E. I. Du Pont de Nemours & Co.*, 146 F.2d 837 (3d Cir. 1944).

stantial evidence,²⁴⁶ and competency of expert testimony²⁴⁷ are determined by the Federal Rules rather than by state law.²⁴⁸

The result in a case like *United States v. Davis*,²⁴⁹ where state law was held to govern in a non-*Erie* situation, is questionable. The court applied a state rule which provided for the genuineness of an instrument filed with a pleading unless denied by the opponent's affidavit. Such a rule cannot materially affect the outcome, since the genuineness of a document can be proved in many other ways. Moreover, when testimony is being heard in a federal court, it is being heard by federal judges who are used to dealing with evidentiary questions based upon the Federal Rules rather than upon state law. Thus in *Dallas County v. Commercial Union Assur. Co.*,²⁵⁰ federal rather than state law was held to determine the question of whether a newspaper could be admitted into evidence under the ancient document exception to the hearsay rule. A fortiori, matters of this nature should be determined by the *lex fori* in conflicts cases.

On the other hand, there are certain evidentiary questions which can be answered only by reference to law that is analytically substantive. An example is whether a statement by an agent is admissible as an admission of the principal where it is claimed that the agent acted beyond the scope of his authority in making the statement. This is determined with reference to state law for *Erie* purposes²⁵¹ and must be determined with reference to the locus in a conflicts case, since the *lex loci* is looked to in order to ascertain the scope of an agent's authority.

Most of the rules of evidence are "neutral." Their invocation may benefit either party. However, there are some rules that are intended to and can benefit only one party. Consider a case such as *Willitt v. Purvis*.²⁵² In this *Erie* situation, state law prohibited any evidence in a wrongful death action to show that the spouse or child plaintiff did not get along with the decedent. Such evidence might be relevant to

246. *Pass v. Firestone Tire & Rubber Co.*, 242 F.2d 914 (5th Cir. 1957).

247. *Travelers Ins. Co. v. Childs*, 272 F.2d 855 (2d Cir. 1959).

248. This is also true as to whether the court will take judicial notice of foreign law or the law of another state in a conflicts situation, assuming the foreign law can be proved. See *Gallup v. Caldwell*, 120 F.2d 90 (3d Cir. 1941). But in *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956), where Saudi Arabian law was involved and no proof of it was introduced, the court looked to the state practice to determine if judicial notice could be taken and concluded that it could not.

249. 125 F. Supp. 696 (W.D. Ark. 1954).

250. 286 F.2d 388 (5th Cir. 1961).

251. *Shahid v. Gulf Power Co.*, 291 F.2d 422 (5th Cir. 1961).

252. 276 F.2d 129 (5th Cir. 1960).

reduce the amount of recovery on the ground that a decedent would contribute less to a family which he did not like. The court refused to admit the evidence on the ground that it was really a rule for measuring damages in death cases. The fact that this rule was expressed in evidentiary form did not alter its purpose, which was to prohibit consideration of possible failure to support in fixing the amount of recovery. Since recovery should be determined with reference to the *lex loci* in conflicts cases, the forum should incorporate that law of the locus which is designed to affect recovery.

Another example of a rule cast in evidentiary form which can materially affect the outcome is the Dead Man's Statute, a matter which is controlled by state law in an *Erie* situation.²⁵³ The purpose of such a statute is to benefit a party claiming under a decedent or the decedent's representative. When a claim is made against the decedent's estate, rebuttal proof of the face-to-face transactions upon which the claim is generally based will often be lacking. The invocation of the rule is likely to have a material effect upon the outcome, since it prevents testimony which would tend to be damaging to the party claiming under the decedent and which would be difficult to rebut. If the locus has such a statute, it should be used as a model by the forum. There is no question of the judge's being accustomed to operating under a different evidentiary scheme, as the rule is statutory and questions can be determined at leisure. The forum's policy favoring admission of all relevant evidence would be outweighed, moreover, by the fact that the locus has decided to benefit parties claiming under the decedent, and that the admissibility *vel non* may have a material effect on the outcome. If the locus does not have such a statute, but the forum does, then it is possible to construct an argument that the forum considers it unfair to permit such testimony. This argument is a weak one, though, for there is nothing inherently unfair about admitting such testimony, and the witness can always be cross-examined. The nonexistence of such a statute represents the policy of the locus that a party in a proceeding against the estate of a dead man should not suffer greater difficulties because of his death. In both instances the admissibility of such evidence may materially affect the outcome and should therefore be determined with reference to the *lex loci*.

253. In *Pritchard v. Nelson*, 228 F.2d 878 (2d Cir. 1955), the court assumed without discussion that the state statute was applicable. In *Wright v. Wilson*, 154 F.2d 616 (3d Cir.), cert. denied, 329 U.S. 743 (1946), the court arrived at the same result by holding that the evidence was inadmissible under the state law and was not admissible under the other provisions of Rule 43(a).

In light of this, the result in *Monarch Ins. Co. v. Spach*²⁵⁴ seems improper. A state statute prohibited the taking of a statement from an insured property owner and excluded it at trial unless the owner had been furnished with a copy of the statement. The federal court held that the statement was admissible in a diversity case when sought to be used primarily for impeachment purposes. The court based its decision on the facts that: (1) impeachment evidence is rarely so decisive in nature as to have a significant effect upon the outcome; (2) the insurer could get a statement by other means under state law; and (3) the plaintiff did not try to get a copy of the statement by pre-trial discovery.

While the purpose of the statute may have been to see that the insured received a copy of the statement, the fact remains that the evidence would have been inadmissible in the state court. Since it would have been inadmissible, it is difficult to see the relevancy of the claim that the insured could have received a statement by other means. The sole question should have been the effect on the outcome. While impeaching evidence ordinarily may not have a great effect, this type of impeaching evidence would. It would show that the insured told the jury one thing and told the insurer another. Since the statement to the insurer would be in writing, its impact upon the jury would be great. There is nothing unfair about prohibiting such evidence, and the state law is not difficult to determine. Because of the effect on the outcome, state law should be applied in an *Erie* case. If such a requirement exists under the *lex loci*, it also should be recognized by the forum in a conflicts case.²⁵⁵

Another case where the forum has ignored the effect of a rule of evidence upon the outcome is *Forney v. Morrison*.²⁵⁶ Under the *lex loci*, testimony as to the conviction of a party for reckless driving was admissible in an action for personal injuries arising out of the same transaction. Under the *lex fori* it was not. The defendants sought to introduce the evidence, and it was held that the *lex fori* applied to prevent its introduction. The court said that since such a conviction did not bar recovery under the *lex loci*, the matter related merely to admissibility

254. 281 F.2d 401 (5th Cir. 1960).

255. For conflicts purposes consideration must also be devoted to the converse situation, where evidence is inadmissible in the forum unless a written copy is given but is admissible in the *lex loci* without the requirement. Here, the forum should bar the evidence. The statute represents the forum's view as to fairness. Certain types of impeachment evidence should be inadmissible unless the party against whom it is sought to be used has received a copy. Moreover, this represents an attempt by the forum to insure compliance by imposing the sanction of nonadmissibility of the evidence. Since the case is tried in the forum, its procedural policy must prevail.

256. 144 W. Va. 722, 110 S.E.2d 840 (1959).

of evidence and was "procedural." Had the law of the locus barred recovery upon such a conviction, the *lex loci* would apply. Conversely, if the law of the locus imposed absolute civil liability upon a defendant who had been found guilty of reckless driving, this law would be recognized. The effect of the rule of the locus is quite similar to that of certain presumptions. The introduction of such evidence practically assures that the result will go against the party convicted of reckless driving unless he can carry out the difficult task of convincing the jury that the conviction was improper. This is another example of absolute liability with a qualification, a matter having a very material effect upon the outcome. In view of this fact, and since the rule of the locus is easily ascertained, admissibility should be determined with reference to the *lex loci*.

As to the difficult evidentiary problem of confidential communications, the considerations for *Erie* and conflicts purposes differ. If the evidence sought to be excluded is so significant that erroneous exclusion or admission would be prejudicial error, it can be said that the operation of privilege materially affects the outcome. For *Erie* purposes the matter is controlled by state law.²⁵⁷ However, in an *Erie* situation the federal and state courts sit in the same place. A case can never arise where one of them has a different interest because it alone is sitting in the state where the communication was made. In a conflicts situation, however, the interest of the forum may differ from that of the locus because one or the other is the place where the communication was made. The purpose of a privilege is to protect the confidential nature of certain communications. Irrespective of the effect upon the outcome, the state where the communication is made is the only state having an interest in protecting this confidentiality.²⁵⁸ If the communication is made in the forum, the forum's law should determine whether a privilege attaches. It is the only state having an interest in the matter, so there is no reason why the *lex loci* should be used as a model. If the communication was made in the locus and is not privileged there, then the privilege should not be recognized, even though the forum would hold the communication privileged. The forum has

257. See, e.g., *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956).

258. This approach has been taken in a case involving out-of-state discovery. In *Matter of Franklin Washington Trust Co.*, 1 Misc. 2d 697, 148 N.Y.S.2d 731 (Sup. Ct. 1956), the plaintiff in a New Jersey action sought to take depositions in New York over the defense of the attorney-client privilege. It was held that New York law governed as to privilege since the communications were made in New York. See also *Metropolitan Life Ins. Co. v. Kaufman*, 104 Colo. 13, 87 P.2d 758 (1939), saying that whether testimony in a prior suit constituted waiver when testimony was sought for deposition purposes would be determined in accordance with the law of the state where the suits were filed.

no interest in assuring confidentiality where the communication was made in another state. There will be a conflict if the communication is privileged at the locus but is not privileged under the *lex fori*. In that case the forum's policy favoring admissibility is adversely affected, but the interest is not so strong as to outweigh the locus' interest in protecting confidentiality.

In summary, most questions of admissibility, competency, and relevancy of evidence should be determined by the *lex fori*, either because they do not have a material effect upon the outcome or because the interference with the effective operation of the forum's judicial system would be too great if the *lex loci* were adopted. However, questions as to rules of evidence which are intended to benefit a particular party should be determined with respect to the *lex loci*, since they are likely to have a material effect upon the outcome, and since their recognition will not interfere with the evidentiary pattern which the forum's judges are accustomed to. Whether communications are privileged should be determined with reference to the law of the state where the communication was made, since it is the only state having any interest in insuring confidentiality.

Allocation of Functions Between Judge and Jury

It is in this area that the procedural policy of the forum is most significant. The forum will not use the *lex loci* as a model when the effect will be to cause a type of trial that the forum considers improper. The forum knows how far its juries can be trusted and when its judges must act. It also knows when the mitigating effects of a jury trial are needed to guard against judicial harshness. The forum has the responsibility for seeing that justice is done in its courts, even if it is acting as a forum of convenience. As Professor Morgan has pointed out:

It goes without saying that . . . [the plaintiff] cannot ask state *A* to set up special machinery for the purpose of handling litigation imported from state *B* or a special method or means of stimulating *A*'s tribunals to act. He must use the machinery and method which *A* has provided and which it uses in litigation originating in *A*. The materials which the parties can be permitted to feed into *A*'s machine must be such as it can satisfactorily process. Experience with that machinery has convinced the courts of *A* that it can operate efficiently and turn out a satisfactory product by using specified kinds of raw materials and no others.²⁵⁹

Moreover, in many instances the allocation of a particular function to

259. Morgan, Rules of Evidence—Substantive or Procedural?, 10 Vand. L. Rev. 467, 469 (1957). Morgan's position on evidentiary matters is equally applicable to judge-jury allocation.

the judge or the jury will not appreciably affect the outcome any more than would the mere fact that suit is brought at the forum rather than the locus.

This limitation has been recognized in the *Erie* situation, so that federal law governs as to whether an issue is triable by the judge or jury. This may be because the matter does not materially affect the outcome, or because federal procedural policy—which may or may not be a constitutional requirement—controls. For conflicts purposes, there is no need to be concerned with constitutional limitations on the forum's power to apply its procedural policy, since it occupies a different position in its role as a forum of convenience than do federal courts in *Erie* situations.

A discussion of whether a particular issue is to be tried by a judge or a jury may begin with a consideration of the approach taken by the Supreme Court in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*²⁶⁰ There the issue arose as to whether the plaintiff was an employee of the defendant within the meaning of the state workmen's compensation statute, so that the statute barred him from bringing an action for personal injuries. Under the state practice this issue was to be determined by the judge; under the federal practice, by the jury. The court held that federal practice governed. It concluded that whether this issue was triable by the judge or jury was not likely to materially affect the outcome.²⁶¹ Moreover, the Court emphasized the traditional role of the jury in the federal courts as reflected in the Seventh Amendment guarantee of the right to trial by jury, though it said that it was not necessary to decide whether this question was covered by the Seventh Amendment.²⁶² In the later case of *Magenau v. Aetna Freight Lines, Inc.*,²⁶³ involving identical facts, the Supreme Court emphasized the lack of effect upon the outcome, observing again that determination by the judge did not represent "an integral part of the special relationship created by the statute."²⁶⁴

These cases are best explained by the absence of an effect upon the outcome. In the ordinary case, a judge's reaction to the facts will

260. 356 U.S. 525 (1958).

261. The court also noted the power of the federal judge to comment on the evidence and to grant a new trial, as well as the fact that the result could differ according to which jury panel tried it. But see *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952), holding that in FELA actions there must be a jury trial even if state practice does not authorize one.

262. See the discussion of this point in Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 Texas L. Rev. 549 (1949).

263. 360 U.S. 273 (1959).

264. 360 U.S. at 278, quoting from *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 536 (1958).

not differ from that of a jury merely because he is a judge.²⁶⁵ Therefore, even without considering the forum's procedural policy, there is no occasion to use the *lex loci* as a model.²⁶⁶ On certain issues, however, it may make a difference whether the judge or jury decides the question. The clearest example is the issue of contributory negligence. Juries often apply comparative negligence despite an instruction not to do so. Because of the lack of precision implicit in fixing money damages for pain and suffering, it rarely can be shown that a verdict has been the result of compromise. Indeed where a state provides that the issue of contributory negligence is to be determined solely by the jury, this may represent a compromise between a fear of blanket comparative negligence and a desire that the doctrine be applied in certain cases. It may also represent an apprehension that judges are too apt to grant directed verdicts on the issue of contributory negligence, so that many retrials may be required. Whether the judge can direct a verdict on the issue of contributory negligence is likely to have a material effect upon the outcome of many cases.

This does not mean, however, that the forum should apply the rules of the *lex loci* pertaining to the judge-jury relationship, for these rules are not intended to apply outside of the locus. Where the locus requires that the issue of contributory negligence be determined solely by the jury, it is concerned with *its* judges and juries. The forum may decide to trust its judges more and its juries less. The procedural policy of the forum may prohibit the jury from employing comparative negligence on an *ad hoc* basis in a case which, under the forum's procedural policy, should never get to the jury in the first place. Using this aspect of the *lex loci* as a model may even violate a constitutional command, where the guarantee to trial by jury is interpreted to mean that the judge must have the power to direct a verdict in a proper case. Thus, the Supreme Court has ruled that the Seventh Amendment guarantee means that the judge must have the power to direct a

265. The result may differ, just as it might be different if the case were heard by one jury panel rather than another. For example, juries drawn from urban areas differ greatly in attitude from those drawn from rural areas within the same state. See Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 194-95 (1944). However, these differences are not "effects upon the outcome" in an analytical sense.

266. See, e.g., *Spencer v. Bright*, 159 F. Supp. 16 (E.D. Ky. 1958) (applying Kentucky law). See also Restatement, Conflict of Laws § 594 (1934).

These same considerations mean that the *lex fori* should also govern in determining whether the nature of relief which the plaintiff is seeking is historically legal or equitable, insofar as this relates to the right to trial by jury. For Erie cases involving this point see *Ettelson v. Metropolitan Life Ins. Co.*, 137 F.2d 62 (3d Cir.), cert. denied, 320 U.S. 777 (1943); *Larsen v. Powell*, 16 F.R.D. 322 (D. Colo. 1954); *Occidental Life Ins. Co. v. Kielhorn*, 98 F. Supp. 288 (W.D. Mich. 1951).

verdict in a proper case. In *Herron v. Southern Pac. Co.*,²⁶⁷ the Supreme Court held that a federal court could direct a verdict on the issue of contributory negligence, even though state practice left the issue exclusively to the jury. As the Court observed:

The controlling principle governing the decision of the present question is that state laws cannot alter the essential character or function of a federal court. The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the "rules of decision" Act.²⁶⁸

This approach has been followed by the lower courts subsequent to *Erie*.²⁶⁹

A fortiori, the forum should not use this aspect of the *lex loci* as a model in a conflicts case, because of the violation of the forum's strong procedural policy as to the power of the court to direct a verdict. In *Hopkins v. Kurn*,²⁷⁰ the Missouri court passed on the question whether to follow a provision of Oklahoma law leaving the assumption of risk issue solely to the jury in a case where the injury occurred in Oklahoma. The court refused to do so on the ground that the statute had been construed by Oklahoma as "procedural." The case relied upon, however, involved a local law question, and should have had no relevance. The point was that the court simply refused to deny the power to its courts to direct a verdict. The locus controls judges and juries at the locus, but the forum is concerned with its own judges and juries. The allocation of functions represents a strong procedural policy of the forum which may be embodied in its constitution.²⁷¹ This

267. 283 U.S. 91 (1931).

268. 283 U.S. at 94.

269. In *Diederich v. American News Co.*, 128 F.2d 144 (10th Cir. 1942), the court held that an Oklahoma rule requiring that the issue of assumption of risk be determined by the jury was inapplicable in a federal court though jurisdiction was founded on diversity of citizenship. Both *Herron* and *Deiderich* were cited with approval in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. at 538-39, 539 n.14. See also *Guthrie v. Great Am. Ins. Co.*, 151 F.2d 738 (4th Cir. 1945), holding that a state statute providing against directed verdicts in libel actions is not binding on a federal court. See also *Rand v. Underwriters at Lloyd's*, 295 F.2d 342 (2d Cir.), cert. denied, 368 U.S. 988 (1961), holding that the reasonableness of notice to an insurer is to be decided by the judge or jury according to federal and not state law.

270. 351 Mo. 41, 171 S.W.2d 625 (1943).

271. A contrary result was reached in *Missouri Pac. R.R. v. Miller*, 184 Ark. 61, 41 S.W.2d 971 (1931), cert. denied, 284 U.S. 688 (1932). The Arkansas court held that it would apply the same Oklahoma statute, even though Arkansas judges had the power to direct verdicts in all cases. The court reasoned only that Oklahoma law governed the rights and liabilities of the parties, ignoring its own procedural policy, possibly expressed in its constitution.

should preclude the use of the *lex loci* as a model. Where the forum does not permit a directed verdict on the issue of contributory negligence, the *lex fori* should govern despite the effect on the outcome. The forum must be able to regulate its own judges and implement its own idea of a fair trial.

The forum's procedural policy is also involved in the issue of the sufficiency of the evidence to take the case to the jury. The issue is not whether the court can direct a verdict, but what criteria it may employ in deciding whether a case should go to the jury. Standards differ from state to state. One may permit the case to go to the jury on slight evidence while another may require the evidence to be such that reasonable minds could differ. One state may rule that the sufficiency of the evidence is determined solely by the plaintiff's evidence, while another may look to the defendant's as well. The standard followed to determine sufficiency may materially affect the outcome, for it determines whether a party definitely prevails or whether he must take his chances with the jury.²⁷²

The forum knows how far it can trust its juries, and it has views as to the fairness of letting a jury decide the case when a certain quantum of evidence has been presented. It is responsible for assuring a fair result. Moreover, the court is conditioned to thinking of the sufficiency of the evidence according to its own standards. These standards are not precise, and it is difficult to apply a shifting standard to the facts of a particular case where the standard of the locus is different. Finally, it must be remembered that the courts of the forum will bear the burden if a new trial has to be granted because the verdict was against the weight of the evidence. The forum may be concerned with overburdening its judicial system with new trials in cases which should not have gone to the jury in the first place.

Under *Erie*, which law governs as to the sufficiency of evidence to take the case to the jury is not clear. In the comparatively early case of *Stoner v. New York Life Ins. Co.*,²⁷³ it was held that the issue was to be determined with reference to state law.²⁷⁴ However, some other courts have indicated that the matter involves judge-jury relationships within the meaning of the Seventh Amendment, so that the sufficiency of the evidence to take the case to the jury must be determined

272. Of course, whether liability exists as a matter of law is determined by the *lex loci*. See *Neal v. Kropp*, 299 S.W.2d 888 (Mo. Ct. App. 1957).

273. 311 U.S. 464 (1940).

274. Accord, *Avlon v. Greencha Holding Corp.*, 239 F.2d 616 (2d Cir. 1956); *General Acc. Fire & Life Assur. Corp. v. Schero*, 160 F.2d 775 (5th Cir. 1947); *Lenning v. New York Life Ins. Co.*, 122 F.2d 871 (3d Cir. 1941); *Occidental Life Ins. Co. v. Thomas*, 107 F.2d 876 (9th Cir. 1939).

by federal law.²⁷⁵ In its most recent pronouncement, the Supreme Court noted the conflict, but left the question open.²⁷⁶

In the *Erie* situation the question is complicated by whether *Erie* represents a constitutional doctrine and whether sufficiency of the evidence relates to the Seventh Amendment. If *Erie* does represent a constitutional doctrine, then federal law cannot govern on a matter which affects the outcome unless sufficiency of the evidence raises a question under the Seventh Amendment. In a conflicts case no such problem arises. The role of a foreign court is different from that of a federal court applying state law, at least insofar as constitutional questions are concerned, and the court of the forum may give full play to its procedural policy. Courts have held that the question of sufficiency of the evidence to take the case to the jury is determined by the *lex fori*.²⁷⁷ This is as it should be. The forum is dealing with its juries and is trying the case in its courts. It must insure fairness and has its own ideas as to when the jury can legitimately be permitted to pass on a question.

The power of the judge to comment on the evidence either has no material effect upon the outcome or represents the forum's notion as to what the jury should hear.²⁷⁸ It should therefore be determined by the *lex fori*.²⁷⁹ The outcome may be affected if the judge suggests the amount of the verdict, but this also relates to the proper role of the

275. *Allen v. Matson Nav. Co.*, 255 F.2d 273 (9th Cir. 1958); *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575 (5th Cir. 1957); *Reynolds v. Pegler*, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955).

276. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959). There both parties had assumed that the state standard was applicable, the lower court did not discuss the question, and the Court concluded that there was no real difference between the federal and the state standards in the context of the case. In *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, the Court distinguished *Stoner* on the ground that there the jury did pass on the question and the issue was merely as to the standard. 356 U.S. 525, 540 n.15.

277. *Boland v. Love*, 222 F.2d 27 (D.C. Cir. 1955); *Childress v. Johnston Motor Lines, Inc.*, 235 N.C. 522, 70 S.E.2d 558 (1952). See also *Restatement, Conflict of Laws* § 595, comment b (1934).

A similar question is presented when an appellate court considers whether to grant a new trial on the ground that there was insufficient evidence to support a verdict. The forum must decide whether its judges should exercise discretion over jury verdicts. The forum is responsible for the fairness of the actions of its juries. This is equally true as to the issue of remittitur, since this is a substitute for a new trial. The forum must decide whether it will permit a party to avoid a new trial by taking less, since the burden of a new trial will be on its courts. *Stevens v. Missouri Pac. R.R.*, 355 S.W.2d 122 (Mo. 1962). Cf. *Smith v. American Mail Line, Ltd.*, 58 Wash. 2d 361, 363 P.2d 133 (1961), holding that state law as to the sufficiency of the evidence upon a motion for a new trial governed in a Jones Act case. But see *Meissner v. Papas*, 124 F.2d 720 (7th Cir. 1941), approving the approach of the lower court in following the state standard as to the sufficiency of the evidence and the state practice as to remittitur.

278. *Reuter v. Eastern Air Lines, Inc.*, 226 F.2d 443 (5th Cir. 1955).

279. *D'Antoni v. Teche Lines, Inc.*, 163 Miss. 668, 143 So. 415 (1932).

judge in advising the jury. Since the case is being tried in the forum, the forum must decide whether its juries are too susceptible to the influence of the judge.²⁸⁰

With regard to the allocation of judge-jury functions, then, it is submitted that the *lex fori* should always govern. Either these matters do not materially affect the outcome or they involve the forum's notion of what is necessary to a fair trial or the efficient operation of its judicial system. It is here that the underlying rationale of the substance-procedure distinction is sound. Courts, realizing that they may apply their own law in such situations, will be more apt to incorporate the analytically procedural law of the locus that materially affects the outcome when to do so will *not* affect the forum's strong procedural policy or the efficient operation of the forum's judicial system.

III

CONSTITUTIONAL QUESTIONS

The Supreme Court has not entered the field of limiting state determinations as to how much of the *lex loci* should be incorporated in conflicts cases. Since the matter is in flux, it cannot be said that a state acts unreasonably when it decides that all questions which are analytically procedural are to be determined by the *lex fori*. Just as the states are given great discretion in their choice of law rules,²⁸¹ they can decide how much of the *lex loci* they are willing to bring over without being said to have acted unreasonably.

The constitutional law cases have involved questions which are slightly different from those found in the normal conflicts case. In some, the forum has attempted to deny enforcement of an interest created by the locus in violation of the full faith and credit clause and the due process clause. In others, there has been an attempt to refuse to effectively enforce a statutory claim established by a sister state by prescribing too narrow a remedy.

280. In *Gillen v. Phoenix Indem. Co.*, 198 F.2d 147 (5th Cir. 1952), it was held that the state practice whereby the judge in awarding damages without a jury referred to verdicts in substantially similar cases as a guide was not binding on the federal court. It found that this did not constitute a limitation on the amount recoverable, and further emphasized that it would violate the principle that the judge cannot suggest the amount of the verdict. Hence, it would be incompatible with the proper function of judge and jury.

281. See *Kryger v. Wilson*, 242 U.S. 171 (1916), holding that a state may, consistent with due process, determine that the validity of a cancellation of a land contract is determined by the *lex loci rei sitae* rather than by the *lex loci contractus*. *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914), is explainable on the ground that interstate commerce was adversely affected or that a federal enclave was involved, but not on the basis that the *lex loci delicti* must always be the place where the injury was suffered.

In *Broderick v. Rosner*,²⁸² a New Jersey statute barred all actions by foreign corporations for statutory assessments except suits for equitable accountings. The statute also provided that necessary parties for such equitable suits included the defendant corporation, its legal representatives, all of its creditors, and all of its stockholders. Such a restriction would have blocked the enforcement of any claim against defendants in the forum, since the suing corporation could not join necessary parties residing elsewhere. The court held that a forum can ordinarily decide what remedy to give, but cannot bar actions created by sister states by prescribing one exclusive and ineffective remedy. The full faith and credit clause was designed to prevent such attempts to protect residents from legitimate claims created by the law of sister states. In a similar vein is *Converse v. Hamilton*.²⁸³ There it was held that the forum could not deny standing to sue to the receiver of a corporation involved in liquidation proceedings in a sister state. Despite the forum's power to determine parties, it had to recognize the receiver's status and allow him to enforce a claim on behalf of creditors of the corporation.

Another difficult situation occurs when the forum applies its statute of limitations to determine whether a claim is barred, disregarding a shorter limitation period contained in an agreement between the parties. Under the right-remedy distinction, there would be nothing to prevent the forum from constitutionally entertaining suit after the running of the locus' statute of limitations. But a time limitation in a contract is not the same as one in a statute of the locus. The validity of a contract is a matter which is analytically substantive under any characterization, and a state cannot alter the terms of a contract by stating that the matter is one of procedure. Thus, a forum may not entertain suit after the period for bringing suit under a contract has expired.²⁸⁴

Finally, the forum cannot use its policy as to judge-jury allocation to refuse to recognize a complete defense created by the *lex loci*. In *John Hancock Mut. Life Ins. Co. v. Yates*,²⁸⁵ an insurance policy was executed and delivered in New York. It was agreed that all matters relating to the policy were governed by New York law. A New York statute provided that false representation as to prior medical care

282. 294 U.S. 629 (1935).

283. 224 U.S. 243 (1912).

284. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). In *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), the same principle was applied to a holding of the state of incorporation that its statute of limitations for recovery of death benefits formed a part of the contract of membership.

285. 299 U.S. 178 (1936).

enabled an insurance company to avoid the contract as a matter of law. Suit was brought in Georgia. The Georgia courts held that it was for the jury to decide whether the insured had made material misrepresentations enabling the insurer to avoid the contract. The Supreme Court reversed on the ground that the forum had failed to recognize a defense created by the *lex loci*. The question was not whether the issue of false representations was to be determined by the court or jury. Under the *lex loci*, the company was not liable once such misrepresentation was made. On the basis of undisputed facts liability did not exist under the *lex loci*, so there could be no question to submit to the jury.

These cases present no real problems. The forum cannot alter the nature of the interest created by the locus by applying its "procedural" law to matters analytically substantive. With this exception, the extent to which the forum should incorporate the *lex loci* as a model is not a constitutional question.

IV

CONCLUSION

I have attempted to analyze the extent to which the forum will incorporate the law of the locus as a model. The matter traditionally has been approached conceptually in terms of substance and procedure. This approach ignores realities and makes the outcome of a given case depend upon the forum in which suit is brought.

When the forum decides to look to the law of another state, it becomes a forum of convenience. The result in a foreign case which it entertains should be no different from the result which would obtain at the locus, since, ideally, it is there that suit should have been brought. The forum is in much the same position as a federal court hearing a matter which is governed by the law of the state in which it sits. The federal court hears the case only because this is thought necessary to prevent prejudice against out-of-state litigants. The *Erie* outcome test has furnished a sound guide for the federal courts, and the same approach can furnish an equally effective guide for the forum in a conflicts case.

The forum is, however, responsible for the fairness of any trial held in its courts. Moreover, it cannot permit interference with the efficient operation of its judicial system merely because it must look to some of the law of another state as a model. By the same token, federal courts have certain responsibilities and must operate within the requirements of the federal constitution. Thus, neither can incorporate all of the law of the reference state. The forum in a con-

flicts case may have greater discretion in implementing its own procedural policy than the federal courts, but the difference is not too great. In this respect, the *Erie* outcome test also may furnish sound guidance.

It is submitted that to the extent that a matter in question materially affects the outcome, it should be determined with reference to the law of the locus, except where to do so would interfere with the efficient operation of the forum's judicial system or violate some strong procedural policy of the forum. When the forum decides to refer to the law of another state and incorporate that law as a model, it has decided that it is a forum of convenience and has no interest in the outcome of the litigation. Its only concern is to see that the proceedings are fair and are in accordance with its own experience as to what is necessary for the effective administration of justice.

Analytical concepts may furnish an adit to a problem, but should not represent the final solution. As long as suits can be brought in any jurisdiction where a party can be served personally, the forum will often be one of convenience and will have to make reference to the law of another state or states. Therefore, when the forum decides that it would have been best if suit had been brought in another state, it should strive to effectuate as nearly as possible the result which would have obtained had suit been brought in the reference state. It is difficult to see how this can be accomplished by conceptualization divorced from the realistic effects of a decision. It is submitted that the approach outlined is a realistic one, can substantially insure the desired similarity of results, and can be effectuated without destroying the role of the forum as an independent tribunal administering justice.